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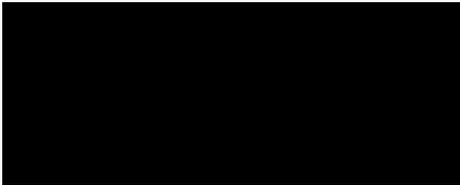
Date: MAY 11 2006

IN RE: Petitioner:  
Beneficiary



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:



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 Director, Vermont Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of New York in January 2001. It wholesales fine fabrics. It seeks to employ the beneficiary as its executive manager. 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 petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner asserts that the director improperly denied the petition.

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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the beneficiary will be employed in a primarily executive or managerial capacity for the United States entity.

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.

On May 20, 2003, the petitioner submitted a Form I-140, Immigrant Petition for Alien Worker, its 2002 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, the first page of its 2001 IRS Form 1120, invoices, bank statements, and 2002 IRS Forms W-2, Wage and Tax Statement, for the beneficiary and two other individuals. The petitioner did not provide other information regarding its organizational structure or the beneficiary's past or proposed employment.

On July 21, 2003, the director requested among other items: (1) additional evidence showing the petitioner's personnel and management structure, including an organizational structure showing the positions the beneficiary would manage; (2) information regarding the subordinate supervisors under the beneficiary's management, the job titles and duties of those managed, the managerial/executive and technical skills required to perform their duties, the time the beneficiary allotted to executive/managerial duties and to non-executive and non-managerial duties, and the beneficiary's degree of discretionary authority in day-to-day operations; (3) copies of the petitioner's Forms W-2 issued for 2002 and of the petitioner's 2003 payroll roster; (4) documentary evidence of the use of contractors, if the petitioner uses contractors; and, (5) an offer of employment to the beneficiary clearly describing the proposed duties to be performed.

In an undated response, counsel for the petitioner claimed: "the beneficiary is solely responsible for the complete growth and development of the company in the United States."

In an affidavit dated October 6, 2003, an individual associated with the foreign entity listed the beneficiary's proposed duties for the United States entity by indicating the beneficiary would:

- Continue to act as the de facto Chief Operating [sic] of [the petitioner].
- Analyze the market conditions in New York and other parts of the United States to determine an appropriate marketing policy for import, wholesale and retail businesses.
- Determine the scope of business operations in the United States and design appropriate operational and material structures in order to improve the marketing policies of [the petitioner] to be fully functional and profitable.
- Plan and develop organization policies and goals for the future growth of [the petitioner].
- Oversee distribution and inventory control of fabrics and textiles in the United States[.]
- Supervise and control the professional management personnel of [the petitioner].
- Exercise authority to make personnel decisions at a senior level like hiring and firing, legal statutory compliances, renting of new premises, marketing and product development activities[.]
- Authority to establish goals and polices of [the petitioner] and analyze to match the requirements of the U.S. market to that of the products manufactured in India.
- Develop new ideas to capture new markets in order to further enhance the customer base in the United States as the customer base in Europe, China, and Japan is already captured.
- Recommend budgets to management and ensure communication and coordination between the offices in India and the United States[.]
- Enjoy discretion in decision-making, which includes selection of location, pricing policies, determination of products to be offered, negotiations with appropriate business partners, etc[.]

- The duties will also include overseeing and managing the finances of the company, including reviewing and determining the appropriate strategies to increase the prospects of the company[.]
- Employ Executives, Officers, Consultants, trainees, etc. on such terms and conditions and on such remunerations as she deems fit from time to time including the power to suspend or dismiss or modify or vary the terms and conditions of such employment.
- Employ designers and developers, at various levels, for product innovation and development activities.
- Open, conduct and operate such Bank account or accounts in the name of and on behalf of [the petitioner] with such Bank or Banks as she finds necessary and also to authorize any person or persons to operate the said accounts and to close such accounts in like manner.
- Enter into agreements or contracts on behalf of [the petitioner] for such purposes and on such terms and conditions, as she deems necessary from time to time [sic] including compromises and accept claim damages.
- Refer any disputes to arbitration and file or withdraw suits on behalf of [the petitioner].
- Appoint CPA and attorneys for assistance in maintaining accounts and dealing with international agreements.
- Oversee Accounts Receivables and Receivables Collection.
- Represent and authorize any person/ persons [sic] on behalf of the representation before any statutory authorities and also authorized to sign all petitions and other documents, whatsoever be its nature, presented before any statutory authorities in New York and for complying with any stipulations of the Federal and State Laws of New York.
- Responsible for the smooth functioning and running of [the petitioner].
- Determine and set corporate policies , [sic] goals and objectives[.]
- Responsible for the Advertisement of the products of the company and global procurement of goods and merchandising.

The affiant also stated that the beneficiary would "manage the coordination of production and supply with efficient marketing strategies and will be responsible for multiplying sales."

Counsel also attached two letters: (1) a September 15, 2003 letter from an education and employment research consulting firm, stating its opinion that the beneficiary's position "clearly meet[s] the standard definition(s) of a position that is Executive in nature requiring an employee functioning in a 'Managerial Capacity,'" and (2) a September 23, 2003 letter from an assistant professor concluding that the beneficiary's job description "exists within the context of 'Managerial Capacity['] and is by its nature Executive."

The record also contains an organizational chart depicting the beneficiary as the operations and marketing vice-president over a design and product development department, a sales and marketing department, a merchandising department and an accounting department. The chart identified one employee in the design and product development department, one employee in the sales and marketing department, and one

employee in the merchandising department. The petitioner also provided job descriptions for two<sup>1</sup> individuals, indicating that both were involved in merchandising and sales and marketing activities. The petitioner indicated that both individuals received clients' inquiries and orders, followed-up on the orders, inquiries, and new design development, prepared purchase orders, processed orders and inquiries, and development of designs, followed-up on receivables and shipments, met with clients, and provided some office management. The petitioner also provided a copy of a New York Form NYS-45-MN, Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return, for the quarter in which the petition was filed. The New York Form NYS-45-MN listed five employees. The petitioner's organizational chart did not include three of the employees on the organizational chart and only described one of the three individual's job duties.

The director determined that: (1) the petitioner's 2001 and 2002 IRS Forms 1120, and the petitioner's 2002 Forms W-2, demonstrated that only the beneficiary was employed in a full-time position; and, (2) it was reasonable to believe, based on the record, that the beneficiary would perform primarily non-qualifying duties. The director also observed that the letters of reference were of little probative value and that the petitioner's description of the beneficiary's duties paraphrased portions of the definitions of the regulations. The director concluded that the record did not show what the beneficiary would do that would qualify as a manager or executive, other than in position title.

On appeal, counsel for the petitioner asserts that the director: (1) failed to take into account the expert opinions offered on behalf of the beneficiary; (2) placed enormous emphasis on staffing levels which are completely irrelevant in rendering a decision; and, (3) failed to consider the petitioner's growing sales. Counsel also expresses surprise at the denial and contends that the director's decision was arbitrary and capricious because the director failed to take into account the specialized nature of the position. Counsel adds that the beneficiary has been a market evaluator, acted as a liaison between the claimed parent company and the petitioner, and has been responsible for the expansion and growth of the parent company internationally. Counsel also includes letters from individuals in the garment industry who consider the beneficiary's job to be managerial and executive. Counsel includes an agency agreement dated February 29, 2004, to show that the beneficiary represents European companies in the United States. Counsel asserts that the petitioner employs five individuals for product development and sales and for merchandiser/project coordinator. Counsel contends that the beneficiary supervises these employees as well as sales agents in different parts of the country.

Counsel's assertions are not persuasive. 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). 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 either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four

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<sup>1</sup> The petitioner only identified one of these individuals on its organizational chart. The identify of the other individual did not correspond to anyone listed on the organizational chart.

criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

In this matter, the petitioner provides a lengthy but repetitious description of the beneficiary's duties. The petitioner's description is couched in generalities, such as, "[c]ontinue to act as the de facto Chief Operating [sic] of [the petitioner]," and "[p]lan and develop organization policies and goals for the future growth of [the petitioner]," and "[a]uthority to establish goals and polices of [the petitioner] and analyze to match the requirements of the U.S. market to that of the products manufactured in India," and is "[r]esponsible for the smooth functioning and running of [the petitioner]." These phrases do not sufficiently define the beneficiary's actual duties but rather paraphrase elements contained in the statutory definition of executive capacity. See section 101(a)(44)(B)(i) and (ii) of the Act. 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, many of the beneficiary's listed duties suggest that the beneficiary is the individual performing basic operational tasks for the petitioner. The petitioner states that the beneficiary "[a]nalyze[s] the market conditions in New York and other parts of the United States to determine an appropriate marketing policy for import, wholesale and retail businesses," and "[o]pen[s], conduct[s] and operate[s] such Bank account or accounts," and "[o]versee[s] distribution and inventory control of fabrics and textiles in the United States," "enter[s] into agreements or contracts on behalf of [the petitioner]," and is [r]esponsible for the Advertisement of the products of the company and global procurement of goods and merchandising." 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 petitioner has not provided evidence of employees, other than the beneficiary, who perform market research, provide marketing and advertising services, perform administrative services dealing with banks, inventory, distribution, procurement, and who negotiate and enter into contracts. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Further, many of the beneficiary's duties are descriptive of an individual in a first-line supervisory position over non-professional, non-managerial, and non-supervisory employees. 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. For example, the petitioner indicates that the beneficiary "[o]verse[s] Accounts Receivables and Receivables Collection," and "[s]upervise[s] and control[s] the professional management personnel of [the petitioner]," and is responsible for employing designers, developers, executives, officers, consultants, and trainees. However, the duties of the beneficiary's subordinates are not indicative of individuals employed in a professional capacity. Moreover, the petitioner does not identify filled positions on its organizational chart showing that the beneficiary's subordinates primarily supervise others or manage essential functions. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N at 190.

Moreover, it is not possible to discern from broadly cast statements, such as, "[d]etermine the scope of business operations," "design appropriate operational and material structures," "[d]evelop new ideas to capture new markets," and [r]ecommend budgets to management and ensure communication and coordination between the offices in India and the United States," that the beneficiary's tasks associated with these duties are managerial or executive.

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The letters submitted by individuals on behalf of the beneficiary's status as a manager or an executive do not take into account the case law interpreting the definitions of managerial or executive capacity or the complete record of proceedings. In this matter, for example, the petitioner fails to document the percentage of time the beneficiary spends on non-qualifying duties. This failure of documentation is important because, as observed above, several of the beneficiary's daily tasks are operational duties and do not fall under traditional managerial or executive duties. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). The AAO cannot indeterminately allocate the beneficiary's time to primarily managerial or executive duties when clearly the beneficiary is also performing non-qualifying duties.

Counsel's claim that the director did not consider the petitioner's growing sales and failed to take into account the specialized nature of the beneficiary's position is not relevant. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Whether the petitioner's business is expanding is not relevant to the state of the petitioner's business when the petition was filed. Moreover, although the beneficiary's position may present challenges, the specialized nature of the position is not relevant to this visa classification.

Finally, the record does not support counsel's contention that the beneficiary supervises five employees as well as sales agents in different parts of the country. The record contains confusing information regarding the petitioner's number of employees. As observed above, the petitioner fails to identify all of its employees on its organizational chart and fails to list all of the employees' job titles and duties. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The 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). 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).

Finally, counsel correctly observes that if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. The AAO observes that it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the

absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of the petitioning enterprise's overall purpose and stage of development. In this matter, the petitioner has failed to adequately support the claim that the beneficiary is relieved from performing operational tasks and the duties of a first-line supervisor of non-professional employees.

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner will comprise primarily executive or managerial duties.

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.