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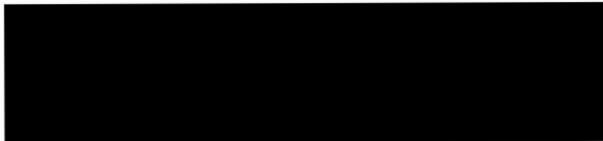
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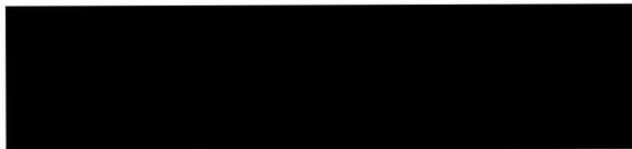
LIN 07 004 51335

Office: NEBRASKA SERVICE CENTER

Date: DEC 01 2008

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.

John F. Grissom, Acting Chief
Administrative Appeals Office

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

The petitioner, a Texas corporation, claims to be a retailer of wireless telephones, wireless accessories, fragrances, and jewelry and to have a qualifying relationship with the beneficiary's claimed employer in India. 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 denied the petition concluding that the petitioner failed to establish that the beneficiary will be or has been employed in a primarily managerial or executive capacity.

On appeal, counsel disputes the director's findings, asserts that the beneficiary will perform, and has performed, primarily qualifying duties, and submits a brief and additional evidence 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.

Title 8 C.F.R. § 204.5(j)(3) explains that a petition filed for a multinational executive or manager under section 203(b)(1)(C) must be accompanied by a statement from an authorized official of the "petitioning United States employer" which demonstrates that:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

The first issue in this proceeding is whether the petitioner provided sufficient evidence to establish that it will employ the beneficiary in a primarily managerial or executive capacity.

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.

The petitioner does not clarify in the initial petition whether the beneficiary will primarily perform managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Given the lack of clarity, the AAO will assume that the petitioner is claiming that the beneficiary will be employed in either a managerial *or* an executive capacity and will consider both classifications.

The petitioner described its business in a letter dated August 31, 2006 as the operation of four retail sales kiosks located in a shopping mall in Longview, Texas. The kiosks are called Jewelry Box, Cellular Wear, Fragrance Island, and Global Cellular. The petitioner claims in both the August 31, 2006 letter and the Form I-140 to employ 12 workers. The beneficiary's proposed job duties as "president" of this enterprise are described in the August 31, 2006 letter as follows:

- Establishing and approving policies and operational objectives of [the foreign employer] and [the petitioner].
- Approving corporate budget and business expansion projects, like the acquisition of new retail stores.
- Approving hiring of Senior Managers.
- Approving marketing efforts.
- Evaluating performance of managers for compliance with policies and profit objectives of [the petitioner].

- Reviewing manager reports on operational and financial issues to determine progress and status in attaining objectives and revising objectives and plans in accordance with current retailing conditions.

The petitioner also submitted an organizational chart for the United States operation. The chart shows the beneficiary at the top of the organization directly supervising a "director," who, in turn, is portrayed as supervising "managers" of each of the four retail kiosks who, in turn, are each portrayed as supervising one or more "assistant managers." However, the petitioner did not describe the duties of any of these claimed subordinate workers.

On August 3, 2007, the director requested additional evidence. The director requested, *inter alia*, additional evidence establishing that the beneficiary will be employed in a primarily managerial or executive capacity, such as "position descriptions or other corporate records setting out the duties of the beneficiary relative to other employees."

In response, the petitioner submitted a letter dated August 27, 2007, in which it indicates that the enterprise now operates three retail kiosks and employs 11 workers. The Fragrance Island kiosk was closed and "consolidated" into the Jewelry Box kiosk.

The petitioner also submitted an organizational chart for the United States operation which differs substantially from the chart submitted with the initial petition. The new chart shows the beneficiary at the top of the organization directly supervising a "director," ██████████. However, instead of supervising "managers" of each separate retail kiosk, the new chart shows the director supervising a single "manager" (██████████) and a single "assistant manager" (██████████), who, together, supervise the sales staff who operate the three remaining retail kiosks. Neither ██████████ nor ██████████ was listed as an employee in the petitioner's payroll records or organizational materials submitted with the initial petition. Accordingly, it appears that these workers, and their corresponding positions, came into existence after the filing of the initial petition on September 14, 2006.

Furthermore, the petitioner submitted job descriptions for the subordinate workers. However, these job descriptions primarily relate to the organizational chart and corresponding workers employed by the petitioner after the filing of the instant petition on September 14, 2006. Importantly, the petitioner did not describe the duties of the individual kiosk managers claimed in the initial petition. Moreover, although the petitioner did describe the duties of the "director" (██████████) whose position appears in both versions of the organizational chart, this worker is not listed in the petitioner's payroll records or wage reports pertaining to the time period during which the instant petition was filed, i.e., September 2006. This worker, who was paid \$4,000.00 in 2006 according to her Form W-2, is identified as having received all of these wages in the fourth quarter of 2006, which occurred after the filing of the instant petition. Accordingly, the record indicates that ██████████ was likewise not employed by the petitioner until after the filing of the instant petition.

The petitioner further described the duties of the beneficiary as follows:

- Establish and approving policies and operational objectives of [the foreign employer] and [the petitioner]. (25% approximately)
- Approve corporate budget and financial plans including business expansion projects like the acquisition of new retail stores. (20%)
- Approve hiring of Senior Managers at [the petitioner]. (10%)
- Approve marketing efforts of retail operations. (15%)
- Evaluate performance of managers for compliance with policies and profit objectives of [the petitioner]. (15%)
- Review manager and director's reports on operational and financial issues to determine progress and status in attaining objectives and revise objectives and plans in accordance with current retailing conditions. (15%)

Finally, it is noted that the petitioner's wage reports and payroll records pertaining to September 2006 indicate that the petitioner employed 10 workers during that time period. However, the petitioner claims in the Form I-140 to employ 12 workers.

On January 25, 2008, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

On appeal, counsel asserts that the director erred and that the beneficiary will primarily perform qualifying duties. Counsel submitted a brief and additional evidence pertaining to the growth of the petitioner's business since the filing of the petition in 2006.

Upon review, counsel's assertions are not persuasive in establishing that the beneficiary will be employed in a primarily managerial or executive capacity.

As a threshold issue, the petitioner's attempt in response to the Request for Evidence to materially change the petitioner's organizational and staffing structure was inappropriate and will not be considered by the AAO. The purpose of a Request for Evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a Request for Evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Furthermore, it is noted that the hiring of workers or the expansion of the business after the filing of the petition may not be considered in determining whether the beneficiary will primarily perform qualifying duties. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Accordingly, only the organizational structure, positions, and actual employees in place at the time the petition was filed in September 2006 will be considered by the AAO in adjudicating the instant appeal. Employees, such as [REDACTED], and [REDACTED], who were not employed until after the filing of the instant petition, as well as the organizational structure described in the

chart submitted in response to the Request for Evidence, may not be considered in determining whether the beneficiary will be primarily employed in a managerial or executive capacity.

In view of the above, in examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The actual duties themselves reveal the true nature of the employment. *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).

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will act in a "managerial" or "executive" capacity. As correctly noted by the director, the petitioner has submitted in support of its petition a vague and non-specific job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis and, consequently, fails to establish that the beneficiary will "primarily" perform qualifying duties. For example, the petitioner states that the beneficiary, in his administration of the mall kiosks, will establish "policies and operational objectives;" approve budgets, plans, and projects; approve hiring and marketing efforts; evaluate workers; review reports; and review "objectives and plans" in accordance with conditions. However, the petitioner fails to specifically describe these policies and objectives or explain, what, exactly the beneficiary will do to evaluate workers and review objectives and plans other than to act as a first-line supervisor of retail kiosk workers. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary will actually perform managerial or executive duties. 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. *Id.* 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).

Consequently, the record is not persuasive in establishing that the beneficiary will primarily perform managerial or executive duties in his administration of the retail kiosks. Not only are the ascribed duties so vaguely described that it cannot be discerned whether any is a bona fide managerial or executive duty, the petitioner failed to establish that the beneficiary will be relieved of the need to perform the non-qualifying administrative, operational, or first-line supervisory tasks inherent to his ascribed duties (e.g., marketing) or to the operation of the enterprise in general (e.g., filing and processing payroll) by a subordinate staff. While the petitioner claims to employ 12 workers in a complex, multi-tiered organization, the petitioner failed to describe the duties of these workers. As noted above, the petitioner originally claimed that the beneficiary will supervise a "director," who, in turn, will supervise "managers" of each of the retail kiosks who, in turn, will each supervise one or more "assistant managers." While the petitioner submitted job descriptions for subordinate workers in response to the director's Request for Evidence, this evidence pertains to an organizational structure, to positions, and to individual employees not in existence at the time the petition was filed in September 2006. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Once 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 Dec. 190. Accordingly, the record is not persuasive in establishing that the beneficiary will "primarily" perform qualifying duties. An employee who

“primarily” performs the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As noted above, the petitioner failed to specifically describe the duties of the "managers" or "assistant managers" as described in the organizational chart submitted with the initial petition. Therefore, it cannot be concluded that any of these claimed workers is a bona fide supervisory or managerial worker. In examining the supervisory or managerial capacity of the workers, CIS will look first to the petitioner's description of the job duties. *See cf.* 8 C.F.R. § 204.5(j)(5). Arbitrarily placing an employee in a position superior to another on an organizational chart will not establish that this employee is a bona fide managerial or supervisory worker. Once 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 Dec. 190. Moreover, while the "director" is identified in the original organizational chart, the record indicates that this individual, ██████████, was not employed by the petitioner until after the filing of the instant petition. Therefore, as the "director" was not employed at the time the instant petition was filed, this worker cannot be considered to be a bona fide managerial or supervisory employee. A petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. at 49. Therefore, it appears that the beneficiary will be, at most, a first-line supervisor of non-professional retail kiosk workers. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. § 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Furthermore, as the petitioner failed to establish the skills or educational backgrounds required to perform the duties of the subordinate positions, the petitioner has not established that the beneficiary will manage professional employees.¹

The petitioner also argues that the beneficiary will manage an essential function of the organization. However, the record does not support this position. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The

¹In evaluating whether the beneficiary will manage 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).

term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary will manage an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. §§ 204.5(j)(2) and (5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the tasks related to the function.

In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. As explained above, the petitioner's vague job description fails to document that the beneficiary's duties will be primarily managerial. Also, the record indicates that the beneficiary will more likely than not primarily perform non-qualifying administrative, operational, and first-line supervisory tasks in his administration of the retail kiosks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties will be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Accordingly, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. 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.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. The beneficiary's job description is so vague that it cannot be discerned what, exactly, the beneficiary will do on a day-to-day basis. As explained above, it appears more likely than not that the beneficiary will primarily perform the tasks necessary to produce a product or to provide a service and will, at most, act as a first-line supervisor of non-professional retail kiosk workers. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C.

Cir. 1991)); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, 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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In this matter, the record contains unresolved inconsistencies pertaining to its staffing. For example, the petitioner claims in the Form I-140 to employ 12 workers. However, the payroll records and wage reports indicate that the petitioner actually employed 10 workers in September 2006 when the petition was filed. The petitioner does not address this inconsistency in the record. 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). 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. *Id.* at 591. Furthermore, based on the evidence of record in this proceeding, it is not credible that the business described by the petitioner, i.e., the operation of four retail kiosks in a single shopping mall, would require the services of a bona fide managerial or executive who will primarily perform qualifying duties. Similar to the enterprise described in *Family, Inc. v. U.S. Citizenship and Immigration Services*, *supra*, it is more likely than not that the beneficiary will primarily perform non-qualifying tasks along side the other retail workers in the administration of the kiosks.

Accordingly, the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties, and the petition may not be approved for that reason.

The second issue in the present matter is whether the petitioner has established that the beneficiary was employed abroad in a primarily managerial or executive position.

The petitioner described the duties of the beneficiary abroad in the August 31, 2006 letter as follows:

- Formulating and administering [the foreign employer's] policies across all units (raw shirt making, fabric cutting, shirt finishing, ironing) and contractors;
- Coordinating the activities of the major manufacturing and retailing units;
- Reviewing with Owner/President and senior managers in the manufacturing units goals, achievements, and necessary adjustments to the manufacturing and sale objectives of the company[;]
- Analyzing manager reports and feedback on manufacturing activities, supply and operational costs, forecast data, and confirming long term strategies were making a positive return; [and]
- Responsible for top level organizational planning at [the foreign employer], across all major units of manufacturing and retail operations[.]

The petitioner also submitted an organizational chart for the foreign employer. The chart shows the beneficiary reporting to the "president" and directly supervising an operations manager and a distribution manager. However, the chart is unclear whether the beneficiary also directly supervises the raw shirt makers, the fabric cutters, the shirt finishers, and the ironing staff, or whether these workers are supervised by the operations manager. It is also unclear whether any of the staff members subordinate to the operations and distribution managers, such as the raw shirt makers, the fabric cutters, the shirt finishers, or the ironing staff, are employees of the petitioner or whether they are contractors or employed by a third party. It is noted that the petitioner did not describe the job duties of any of these claimed subordinate workers.

On August 3, 2007, the director requested additional evidence. The director requested, *inter alia*, additional evidence establishing that the beneficiary was employed in a primarily managerial or executive capacity, such as evidence "setting out the beneficiary's duties relative to other employees."

In response, the petitioner submitted a materially identical job description for the beneficiary indicating that the beneficiary devoted an equal amount of time (20%) to each of the five ascribed duties. The petitioner also described the duties of the operations manager as follows:

- Direct and coordinate activities of operations concerned with the production, manufacturing, pricing, sales, and distribution of merchandise.
- Manage staff, preparing work schedules and assigning specific duties.
- Review financial statements, sales and activity reports, and other performance reports to measure productivity and goal achievement and to determine areas needing cost reduction and program improvement.
- Establish and implement policies, goals, objectives, and procedures, conferring with the President, managers, and staff members as necessary.
- Determine staffing requirements, interview, hire and train new employees.
- Monitor businesses to ensure efficient and effective services while staying within budgetary limits.
- Oversee activities directly related to making merchandise including employees and contractors' performance and productivity.
- Evaluate sales of merchandise, and set prices and credit terms, based on forecasts of customer demand.
- Manage the movement of merchandise into and out of production facilities.

The petitioner described the duties of the distribution manager as follows:

- Manage the overall activities of workers engaged in quality checking and distributing merchandise.
- Plan, develop, and implement distribution policies, warehouse safety and security programs and activities.
- Review invoices, work orders, consumption reports, and demand forecasts to estimate peak delivery periods and to issue work assignments and distribution schedule.

- Schedule and monitor pickup, delivery, or distribution of merchandise.
- Interview, select, and train warehouse and supervisory personnel.
- Respond to customers' or shippers' questions and complaints regarding storage and distribution services.
- Inspect physical conditions of warehouses, vehicle fleets and equipment, and supervise repair or replacement as necessary.
- Develop and document standard and emergency operating procedures for receiving, handling, storing, distributing, or salvaging merchandise.

The petitioner also indicates that both the operations manager and the distribution manager supervise subordinate workers. However, as noted above, the record indicates that the raw shirt makers, the fabric cutters, the shirt finishers, and the ironing staff are either contractors or employees of third parties. Likewise, the distributors, who are allegedly supervised by the distribution manager, are employed in locations throughout India, and the record is devoid of evidence establishing that any of these workers is an employee of the foreign employer.

On January 25, 2008, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity.

On appeal, counsel asserts that the director erred and that the beneficiary primarily performed qualifying duties.

Upon review, counsel's assertions are not persuasive in establishing that the beneficiary was employed in a primarily managerial or executive capacity.

As explained above, in examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. At 1108, *aff'd*, 905 F.2d 41.

In this matter, the petitioner's description of the beneficiary's job duties abroad fails to establish that the beneficiary acted in a "managerial" or "executive" capacity. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary did on a day-to-day basis and, consequently, fails to establish that the beneficiary "primarily" performed qualifying duties. For example, the petitioner states that the beneficiary formulated and administered "policies" and "contractors;" reviewed goals, achievements, and adjustments; analyzed reports and feedback; and was responsible for "top level organizational planning." However, the petitioner failed to specifically describe these policies or the "top level organizational planning" or to explain what, exactly, the beneficiary did to administer "contractors" other than to supervise the raw shirt makers, the fabric cutters, the shirt finishers, and the ironing staff in their performance of tasks. Specifics are clearly an important indication of whether a beneficiary's duties were primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.* Once 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 Dec. 190. Consequently, the record is not persuasive in establishing that the beneficiary "primarily" performed qualifying duties. An employee who "primarily" performed the tasks necessary to produce a product or to provide services is not considered to have been "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604.

The petitioner has also failed to establish that the beneficiary supervised and controlled the work of other supervisory, managerial, or professional employees, or managed an essential function of the organization. The petitioner claims that the beneficiary supervised an "operations manager" and a "distribution manager." However, the petitioner has failed to establish that either of these workers is a bona fide supervisory or managerial employee. The record does not establish that any of the claimed subordinate workers, e.g., the distributors, the raw shirt makers, the fabric cutters, the shirt finishers, or the ironing staff, are truly being supervised and controlled by the operations manager or the distribution manager. To the contrary, it appears more likely than not that these workers are employed by third party service providers or are independent contractors, and are thus not under the daily control of the petitioner or its employees. An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another worker, or because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. Once 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 Dec. 190. Therefore, it appears that the beneficiary was, at most, a first-line supervisor of non-professional employees. Once again, a managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. Section 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604. Furthermore, as the petitioner failed to establish the skills or educational backgrounds required to perform the duties of the subordinate positions, the petitioner has not established that the beneficiary managed professional employees.

Accordingly, the petitioner has not established that the beneficiary was employed primarily in a managerial capacity.

Similarly, the petitioner has failed to establish that the beneficiary acted in an "executive" capacity. The beneficiary's job description is so vague that it cannot be discerned what, exactly, the beneficiary did on a day-to-day basis. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.²

²It is noted that counsel on appeal claims that the director incorrectly determined that the beneficiary administered "contracts" abroad. Upon review, it appears that the director was referring to the beneficiary's administration of *contractors*, which is the first duty ascribed to the beneficiary by the petitioner. Accordingly, this statement by the director appears to have been, at most, a harmless typographical error given the context, and counsel's argument is not persuasive in establishing that the director's decision was erroneous.

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Page 14

Accordingly, the petitioner has failed to establish that the beneficiary primarily performed managerial or executive duties abroad, and the petition may not be approved for that reason.

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.