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U.S. Citizenship
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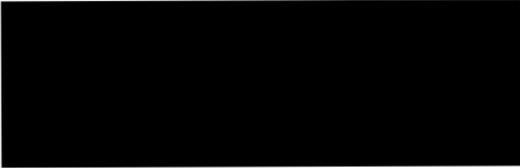
Petitioner:

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, Chief
Administrative Appeals Office

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

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of New York that is engaged in the import and wholesale of handbags. The petitioner seeks to employ the beneficiary as its chief executive officer and president.

The director denied the petition on July 24, 2006. 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 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 director mischaracterized the nature of the petitioner's business, erroneously noted discrepancies with respect to the number of employees working for the U.S. company, and placed undue emphasis on the company's staffing levels. Counsel asserts that the beneficiary will be employed in a managerial capacity. Counsel submits a brief in support of the appeal.

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 sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed in a managerial or executive capacity for the United States entity.

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.

The immigrant petition was filed on December 20, 2004. The petitioner stated on Form I-140 that the beneficiary would be employed as chief executive officer and president of the eleven-person company. The

petitioner submitted a supporting letter dated November 23, 2004, in which it described the beneficiary's employment as CEO and president as follows:

[H]e will be responsible for overseeing all U.S. operations, setting organizational goals and policies, hiring personnel, coordinating with our overseas parent company and making other fundamental business decisions. He will direct managerial/professional employees responsible for accounting, merchandising and other key corporate functions. He will liaise with our overseas management on all major corporate matters and ensure the coordination of operations between us and our overseas headquarters.

The petitioner submitted its New York Form NYS-45, Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return for the third quarter of 2004, which indicated a total of eleven workers. The petitioner also submitted an organizational chart which depicts the beneficiary as CEO and president over two vice presidents and a general manager, who in turn supervises an IT specialist, an import/customs employee, three sales and marketing employees, a warehouse worker, and an employee responsible for accounts payable/receivable and credit/collection. All of the employees identified on the organizational chart appear on the petitioner's quarterly wage report as of September 30, 2004.

The director issued a request for evidence on October 4, 2005, in part, instructing the petitioner to submit additional evidence to establish that the beneficiary would be employed by the United States entity in a managerial or executive capacity. Specifically, the director requested: (1) a detailed description of the beneficiary's executive/managerial duties to include a breakdown of the number of hours to be devoted to each duty on a weekly basis; (2) a copy of the company's 2004 Forms W-2 and W-3, and evidence of the 2005 payroll roster; (3) copies of IRS Forms 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2004 and first quarter of 2005; and (4) evidence documenting the number of contractors used by the company, and duties performed, if applicable. The director also asked specific questions regarding the number of supervisors managed by the beneficiary, the job titles and job duties of all employees managed, the amount of time the beneficiary allocates to managerial/executive duties, and the degree of discretionary authority the beneficiary exercises over the day-to-day operations of the company.

In a response received on December 30, 2005, the petitioner provided the following description of the beneficiary's duties:

50% of the time – at the New York office

- 1) Setting company policies and direction for the company's development including products expansion/marketing and personnel structure.
- 2) Manage human resources and make determination on staff recruitments especially staff manpower.
- 3) Attending meetings and obtain reports from department managers. Periodically discuss various situations arising from day-to-day work with salespersons, showroom employees, and warehouse management and solve all related issues.
- 4) Oversee account with major customers – discuss products, market and customer services with major customers and make decision on major contracts.

- 5) Oversee the efforts of research on fashion trend through internet, fashion magazine and other sources to decide new product development.
- 6) Oversee and manage general company affairs including accounting, marketing/promotion, legal, government, customs, etc.

15% of the time – traveling to different cities throughout the U.S.

- 1) Conducting market research - Travel to US major wholesale markets such as Chicago, Los Angeles, Dallas, Houston, and Miami... etc. to get more knowledge about the handbag market, our product's share in the markets, as well as fashion market trend.
- 2) Meeting wholesalers – travel to meet wholesale customers to get feed back about our products, customer services, and product pricing, etc.
- 3) Attending trade shows – Attend major trade shows such as ASD/AMD Trade Show in Las Vegas to get more customers and promote our products.

35% of the time – at the main office in China

- 1) Attending meetings/report to management – Discuss material resources, product line, cost and profit, and quality control etc. with purchasing, design and production department.
- 2) Placing orders and scheduling production for the new season
Discuss and select styles and colors for coming season based on US market and customer needs.
Place orders in term[s] of quantity of each style and make production and shipment schedule.
- 3) Search and collect new material samples that may [be] suitable for US market and provide them to US customers to get feed back

The petitioner also submitted its quarterly wage report for the fourth quarter of 2004, which listed a total of ten employees as of the date the petition was filed. The petitioner attached an organizational chart which was similar to the chart provided in support of the petition, but listed a different individual as "warehouse," and showed only two employees in the sales/marketing department.

The director denied the petition on July 24, 2006, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director noted some discrepancies between the petitioner's quarterly wage reports and organizational chart, and found that only the beneficiary earned a salary that is "commensurate with a full-time managerial or executive position in a major metropolitan retail market." The director emphasized that the petitioner had failed to provide the requested evidence regarding the job duties performed by the beneficiary's subordinates, and found that the beneficiary's job description was too vague to establish that he would be employed in a qualifying managerial or executive capacity in the context of the petitioner's current staffing arrangement.

The director further noted that the petitioner reported gross sales in excess of \$5,000,000, while the evidence submitted only confirmed the employment of one part-time sales person at the time of filing. The director therefore concluded that it "seems likely that the beneficiary has been and will be primarily engaged in providing sales and services to your organization's clients," or otherwise providing the goods and services of the U.S. company.

On appeal, counsel for the petitioner asserts that the director mischaracterized the evidence submitted and misapplied legal standards. Counsel emphasizes that the petitioner is the leaseholder of several facilities including a showroom and several warehouses, and not merely a "storefront" as noted by the director. Counsel states that the petitioner typically employs ten employees, "some of whom leave or are newly hired at various times, causing the director to characterize these changes as discrepancies." Counsel suggests that these perceived discrepancies caused the director to "summarily dismiss" the evidence submitted.

Counsel further notes that the petitioner did submit an extensive job description in response to the request for evidence, and that the director erroneously dismissed the description as "vague." Finally, counsel contends that the director appeared to base the decision solely on the employees' job descriptions. Counsel alleges that "no regard has been paid to the fact that the beneficiary is in charge of an enterprise with substantial staff, business and facilities." Counsel concludes that it would be a "patent absurdity" for a business of the petitioner's magnitude to operate without anyone deemed to be a manager.

Upon review of the record in this matter and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity.

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 AAO acknowledges that the petitioner did in fact submit a fairly detailed position description in response to the director's request for evidence and it is not clear from the director's decision whether such description was fully reviewed. The petitioner provided a list of fifteen duties divided among three broad responsibilities, and indicated the percentage of time the beneficiary devoted to each area of responsibility. However, upon review, the job description fails to establish that the beneficiary's duties are primarily managerial or executive in nature.

The petitioner indicates that the beneficiary devotes 15 percent of his time to "conducting market research," meeting wholesale customers to get feedback about products, pricing and customer services, and attending trade shows "to get more customers and promote our products." The petitioner has not articulated why these market research and promotional duties should be considered managerial or executive in nature. In addition, the petitioner indicates that the beneficiary spends 35 percent of his time in China to "discuss and select styles and colors," place orders, and make shipment schedules, and to search for and collect new material samples. Based on the petitioner's representations, the beneficiary is directly responsible for performing operational duties related to product design and procurement of inventory, and it has not been established that any lower-level staff would relieve the beneficiary from performing these non-qualifying duties. Overall, these responsibilities, which account for half of the beneficiary's time, have not been shown to be comprised of primarily managerial or executive 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner indicates that the remainder of the beneficiary's time is related to managing the petitioner's New York office. The petitioner highlights the beneficiary's responsibility for setting company policies and direction and managing human resources, duties which would typically fall under the statutory definitions of managerial or executive capacity. However, some of the beneficiary's stated responsibilities related to the management of the New York office cannot be readily classified as qualifying duties based on the evidence of record. For example, the petitioner indicates that the beneficiary oversees accounts with major customers, including discussion of products, market and customer service issues. The petitioner has not adequately clarified the distinction between the beneficiary's responsibility for overseeing the accounts of "major customers" and more routine customer sales and service tasks, and it is therefore difficult to determine whether this duty should be considered managerial or executive in nature. Further, the petitioner states that the beneficiary "oversees the research on fashion trend[s] through internet, fashion magazine, and other sources." The petitioner does not clarify whether the beneficiary supervises lower-level employees who perform these research-oriented tasks, or whether the beneficiary himself is required to research market and fashion trends. Based on these deficiencies, the AAO cannot determine that the beneficiary devotes a full 50 percent of his time to performing managerial or executive duties associated with oversight of the New York office.

The definitions of executive and managerial capacity 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 functions. *Champion World, Inc. v. INS*, 940, F.2d 1533 (Table) 1991 WL 144470 (9th Cir. July 30, 1991). Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of providing that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. The word "primarily" is defined as "at first," principally,' or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, or other non-qualifying operational or administrative tasks that individual cannot also be "principally" or "chiefly" perform managerial or executive duties. In the instant matter, the petitioner has failed to show that non-qualifying duties will not constitute the majority of the beneficiary's time.

The petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy. Therefore, when examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy.

In this matter, the petitioner's description of the beneficiary's job duties does not clearly establish his employment in a managerial or executive capacity, and the petitioner's initial evidence, which included an organizational chart with incomplete job titles for its employees, was insufficient to provide a clear picture of the personnel structure of the U.S. company. Accordingly, the director reasonably requested additional

evidence regarding the number of subordinate supervisors under the beneficiary's management, the job titles and job duties of the employees managed, and, if applicable, evidence of the petitioner's use of outside contractors. In response, the petitioner submitted an updated organizational chart which again failed to clearly identify the job titles of many of the employees. The petitioner did not address the director's request for job descriptions for the beneficiary's subordinates, nor acknowledge whether the petitioner utilizes any outside contractors.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The evidence requested by the director was critical, as the petitioner did not appear to have lower-level employees assigned to perform duties related to procurement, ordering and production coordination, and product and market research, and the beneficiary's description of the beneficiary's duties suggests that he directly performs these tasks. The 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).

While counsel correctly suggests on appeal that the job descriptions of the lower-level employees cannot be used as the sole focus in determining the beneficiary's employment in a managerial or executive capacity, this argument does not excuse the petitioner from responding to the director's request. The fact that the beneficiary manages a business, regardless of its size, 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. 26, 1987). Therefore, counsel's argument that "the beneficiary is in charge of an enterprise with substantial staffing, business and facilities," is insufficient to establish the beneficiary's employment in a qualifying capacity. 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). Here, the actual duties performed by the beneficiary, are not clearly primarily managerial or executive in nature, and a meaningful review of the totality of the circumstances regarding the beneficiary's employment has been impeded by the petitioner's failure to provide requested evidence regarding its personnel structure. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Although the beneficiary is not required to supervise personnel, if it is claimed that his managerial duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

As noted above, although requested by the director, the petitioner did not provide the job titles for all of the petitioner's employees, or the job descriptions for any of the beneficiary's employees. Any 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). The AAO cannot draw any conclusions regarding the employment capacity of the beneficiary's subordinates without this evidence. Therefore, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, 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 addition, as noted above, the petitioner must substantiate that the duties of the beneficiary and those of his or her subordinates correspond to their placement in an 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 manager position. Here, the petitioner employed ten employees at the time of filing, and assigned managerial or executive job titles to four of them; however the AAO notes that one of the individuals identified as "vice president," and the "general management" employee are among the lowest-paid employees of the petitioner's workforce. The AAO also questions the petitioner's claim that it employs two vice presidents, but only one warehouse worker, given counsel's statement on appeal that the company operates "several warehouses," and considering the absence of evidence that the company utilizes outside contractors to perform warehousing or other duties. Further, the petitioner's "sales/marketing" department appears to have been staffed by two part-time and one full-time worker as of the date of filing. Considering the petitioner's annual sales of \$5 million, it has not been established that the company's sales and marketing needs could plausibly be met by these three employees. Each of the petitioner's remaining "departments" appears to be staffed by only one worker, notwithstanding the petitioner's reference to "department managers." Finally, as mentioned above, the petitioner does not have a purchasing or procurement department, and has in fact indicated that the beneficiary directly performs tasks associated with purchasing inventory. The petitioner's organizational chart alone is therefore insufficient to establish the beneficiary's employment in a managerial or executive capacity.

Based on the limited evidence regarding the petitioner's personnel structure, it cannot be determined whether the beneficiary's subordinates would reasonably relieve him from performing non-qualifying duties associated with the petitioner's day-to-day operations, particularly with respect to the sales, marketing, product and market research and procurement functions. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) or (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The petitioner has not submitted evidence on appeal to overcome the director's determination with respect to this issue. Accordingly, the appeal will be dismissed.

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.