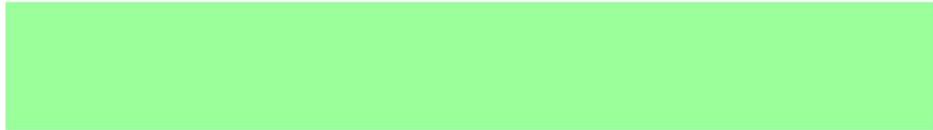


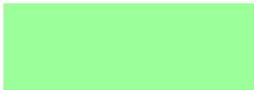
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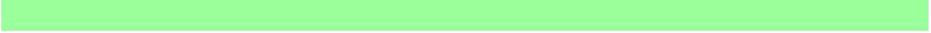


U.S. Citizenship
and Immigration
Services



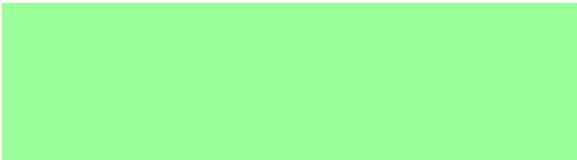
DATE: DEC 02 2014 OFFICE: TEXAS SERVICE CENTER

FILE: 

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)

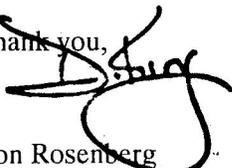
ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you, 

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner is a U.S. entity that operates as a footwear manufacturer, wholesaler, and retailer. It seeks to employ the beneficiary in the United States as its designer director. 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 would be employed in the United States in a qualifying managerial or executive capacity.

I. The Law

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.

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.

II. Procedural History

The record shows that the petition was filed on August 21, 2013 and was accompanied, in part, by the petitioner's supporting statement, dated June 5, 2013, in which the petitioner indicated that the beneficiary will be responsible for creating on-line designs and prototypes as well as "off-line and conceptual product designs." The beneficiary would manage one associate designer and report directly to the vice president of men's casual footwear. The petitioner provided a job description, indicating that the beneficiary would be the lead designer, who would build and eventually manage and oversee a design team. The petitioner also provided an organizational chart depicting the entire operation's staffing levels. The chart shows the staffing structure of the petitioner's men's casuals group, which places the beneficiary, along with two other directors, as subordinates of the group's vice president. The chart also shows one junior/associate designer as the beneficiary's subordinate, while the beneficiary's colleagues, who were similarly placed within the men's casuals category, had four and five subordinates, respectively. The petitioner provided an additional chart,

whose sole focus was the beneficiary's specific department, where four of the positions listed, including three associate designers and one intern/assistant, were shown as proposed positions to be filled at some unspecified future time.

On October 31, 2013, the director issued a request for evidence (RFE), informing the petitioner that the record lacks sufficient evidence to establish that the beneficiary would be employed in the United States in a managerial or executive capacity as claimed in the petitioner's supporting documents. The director acknowledged the petitioner's submission of the beneficiary's job description and organizational chart, finding that the petitioner failed to specify whether the junior designer position subordinate to the beneficiary was that of a professional. The director further informed the petitioner that the beneficiary's designer duties could not be deemed as being within a qualifying managerial capacity and reiterated the petitioner's burden of having to establish that the beneficiary's proposed position must be primarily comprised of qualifying tasks. Accordingly, the director instructed the petitioner to provide a list of the beneficiary's specific daily job duties and to indicate what percentage of time the beneficiary would allocate to each of the enumerated tasks.

In response, the petitioner provided a statement, dated January 10, 2014, which included the following percentage breakdown:

- Manage [the] Associate Designers/Junior Designers and Design Inter[n]/Design Academy Student directly; 20%
- Control a departmental budget of approximately \$250,000; 10%
- Build up a design team, which will consist of four Associate Designers and one Intern; 10%
- Mentor the development of junior designers establishing training requirements and coaching key skill areas; 10%
- Manage and oversee the design team's operation; 10%
- Manage adherence to design/development timelines for global men's design team; 7%
- Design creative product concepts to meet all consumer and commercial aspects of the brief; 5%
- Act as lead designer for men's global design team, take part in strategic range planning activities; 3%
- Develop last and unit designs in conjunction with [the] Business Unit (BU) Engineer; 5%
- Develop initial design concepts to [the] prototype stage; 5%
- Coordinate with factories and suppliers to develop a range of samples to meet the development timeline; 5%
- Finalize Design Brief with BU Director; 1%
- Coordinate with freelance/outside design resource to deliver against design brief requirements; 2%
- Interact and coordinate with the group heads of Dress and of Casuals and with development managers and designers to establish design priorities and allocate workload for the global design team, and to manage design workflow; 2%
- Coordinate with [the] trends team to develop seasonal trend themes and colors to drive the creative inspiration and direction; 2%
- Responsible for developing and owning the men's global leather and material palette, driving efficient use of leathers and controlling leather sampling cost; 2%
- Utilize technology to improve development speed and accuracy. 1%

The petitioner referred to the beneficiary as a senior manager and indicated that the beneficiary would have complete discretionary authority over matters concerning daily office activities. The petitioner also resubmitted the same two organizational charts that were discussed above among the petitioner's initial supporting documents and supplemented the record with the junior designer's job description.

In a decision dated February 19, 2014, the director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director found that the job duties that accounted for 67% of the beneficiary's time were overly vague and further noted that a number of the beneficiary's proposed job duties would be non-qualifying. The director also considered the beneficiary's subordinate employee, finding that a single-person support staff was unlikely to result in the beneficiary allocating a considerable amount of time managing and mentoring his subordinate. Furthermore, the director found it doubtful that the beneficiary's limited support staff would be sufficient to relieve the beneficiary from having to allocate his time primarily to non-qualifying tasks.

The petitioner subsequently filed an appeal supported by an appellate brief from counsel, who restated the beneficiary's job description and asserted that 67% of the beneficiary's time would be allocated to duties within a managerial capacity. Counsel also asserted that the director overemphasized the beneficiary's job description without giving due consideration to the petitioner's organizational structure and the beneficiary's position with respect to employees.

Upon review, and for the reasons stated below, we find that the petitioner has failed to establish that the beneficiary will be employed in a primarily managerial or an executive capacity.

III. Issues on Appeal

As indicated above, the sole issue to be addressed in this proceeding is the beneficiary's proposed employment with the U.S. entity and whether the evidence provided established that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

In general, when examining the executive or managerial capacity of a given position, we review the totality of the record, starting first with the description of the beneficiary's proposed job duties with the petitioning entity. See 8 C.F.R. § 204.5(j)(5). Published case law has determined that the duties themselves will reveal the true nature of the beneficiary's 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). We then consider the beneficiary's job description in the context of the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that may contribute to a comprehensive understanding of a beneficiary's actual duties and role within the petitioning entity.

Turning first to the beneficiary's job description, we note that a number of the beneficiary's job duties make references to a design team whom the beneficiary would manage. However, a review of the petitioner's organizational chart – particularly the men's category headed by the beneficiary – indicates that of the four assistant designer positions, three were vacant at the time the petition was filed. The chart also shows one design intern/assistant position subordinate to the beneficiary. However, that position was also vacant at the time the petition was filed, thus leaving the beneficiary with a support staff that consists of one associate designer. Neither the supporting evidence nor the list of the beneficiary's job duties establish that the

organizational hierarchy of the department headed by the beneficiary is sufficient to relieve the beneficiary from having to allocate his time primarily to tasks of a qualifying nature. Despite the petitioner's claim that the beneficiary would spend 20% of his time managing a design team, 10% mentoring junior designers, and 10% overseeing the design team's operation, the organizational chart indicates that the petitioner did not have a design team in place for the beneficiary to oversee. The petitioner has failed to establish that a single employee constitutes a "design team" or that nearly half of the beneficiary's time would be allocated to overseeing the work of a single employee. 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)). In the present matter, it appears that the beneficiary's managerial job duties are merely a projection of future tasks the beneficiary would carry out once he has completed the initial task of hiring employees to build a design team, which he would eventually manage once the vacant positions have been filled.

While we do not dismiss or trivialize the beneficiary's discretionary authority and key role in building the design team and making other critical decisions within his department, the record does not indicate that a support staff of one employee would allow the beneficiary to focus his time primarily on managing staff and making discretionary decisions. In fact, looking further at the beneficiary's job description, it is apparent that the beneficiary would assume an active role resulting in his having to carry out a number of design tasks. While no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. 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). Here, in the absence of an actual design team, the record indicates that the non-qualifying design teams would likely be integral, rather than incidental, to the beneficiary's proposed employment.

On appeal, counsel asserts that the petitioner "is undergoing an internal organizational restructure and intends to establish a design function in the United States." Counsel further explains that the beneficiary has been transferred to the United States for the purpose of executing this corporate plan. We note however, that 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). In the matter at hand, the record indicates that the petitioner's needs at the time of filing required the beneficiary to assume an active role in seeing the petitioner's restructuring plan to fruition, which would include hiring staff, who would eventually perform various design tasks, and carrying out various design tasks himself. While it is possible, after the beneficiary successfully hires a subordinate design staff, that the beneficiary would eventually assume a position that will primarily entail tasks within a qualifying managerial capacity, the record does not establish that the department headed by the beneficiary had achieved a level of organizational complexity wherein the petitioner had the capability of relieving the beneficiary from having to focus his time primarily on the department's daily operational tasks.

In addition, while counsel contends that design is a critical function within the petitioning entity and thus essential to the success of the petitioner's business, implying that the beneficiary can be deemed a function manager, the beneficiary's duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. As discussed above, the petitioner did not provide sufficient evidence to establish that it has the ability to relieve the beneficiary from having to allocate his time primarily

to the performance of non-qualifying tasks; nor does the evidence of record demonstrate that the petitioner had the need for such an employee at the time the petition was filed. Rather, the record indicates that the beneficiary would continue to carry out tasks that are needed to hire the necessary design personnel so that the department eventually fills the positions of four associate designers and one intern. Until such time, it appears that the beneficiary would continue to carry out whatever tasks are necessary to advance the beneficiary's department beyond its initial stage of development.

Despite the petitioner's immediate needs at this early stage of development of the design department that is currently headed by the beneficiary, the petitioner maintains the burden of establishing that the proposed position meets all statutory and regulatory requirements. As previously stated, 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. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties). Furthermore, 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 *id.* at section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). Here, the petitioner is fairly clear in indicating that the beneficiary would manage personnel rather than a function. Thus, counsel's implied argument that the beneficiary's position can meet the statutory definition of managerial capacity even if the beneficiary does not primarily manage personnel is irrelevant to the facts presented in this instance.

Lastly, with regard to counsel's repeated references to unpublished AAO decisions, we note that while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Accordingly, in light of the evidence discussed above, the petitioner has failed to establish that the beneficiary's proposed employment would be within a qualifying managerial or executive capacity and on the basis of this adverse finding this petition cannot be approved.

IV. Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.