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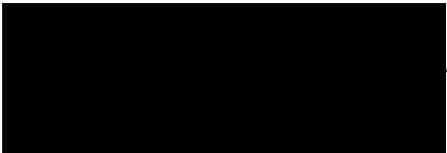
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUN 16 2005
WAC 02 255 50737

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:



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.

f Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based petition. Counsel for the petitioner subsequently filed a motion to reopen and reconsider, which the director dismissed. This matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the immigrant petition seeking 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 California corporation that is engaged in the publishing and sale of Hebrew books, tapes and software. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition concluding that the petitioner had not established that the beneficiary has been employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel claims that as the president of the petitioning organization, the beneficiary is the "top executive manager" of the company, whose job duties satisfy the definition of "executive capacity." Counsel also contends that the size of the organization's staff, which included five employees at the time of filing the petition, is not indicative of the beneficiary's employment capacity as a manager or an executive. 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 or 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 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. 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the beneficiary would be employed by the United States entity 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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 filed the immigrant petition on August 12, 2002, noting that as president of the organization, the beneficiary would direct and coordinate the business' activities. Accompanying the petition was a current list of the petitioner's four employees, including the beneficiary and three sales representatives. The petitioner provided copies of its state quarterly tax returns, yet none corresponded to the quarter during which the petition was filed. The petitioner also submitted a letter from the foreign entity's accountant, dated June 1,

2002, wherein the accountant confirmed the beneficiary's employment in the United States "directing" two of the organization's bookstores, maintaining the company's website, and "developing and opening more stores."

On October 28, 2002, the director issued a request for evidence asking that the petitioner submit a detailed description of the beneficiary's position in the United States entity, including the beneficiary's job duties, the percentage of time spent on each task, and the education and employment qualifications for the position. The director also requested that the petitioner submit a list of the employees directed by the beneficiary, their job titles, a description of the position held by each, and copies of the petitioner's state quarterly wage reports for the third quarter of 2002.

Counsel responded in a letter dated December 10, 2002 and provided the following list of the beneficiary's job duties as president of the petitioning entity:

1. Plan, develop, and establish policies and objectives of business organization in accordance with board directors. (20% of time spent)
2. Confer with company official[s] to plan business objectives, to develop organizational policies to coordinate functions and operations between departments, and to establish responsibilities and procedures for attaining objectives. (20% of time spent)
3. Review activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plan in accordance with current conditions. (25% of time spent)
4. Direct and coordinate formulation of financial status to provide funding for new and continuing operations to maximize returns on investments, and to increase productivity. (25% of time spent)
5. Plan and develop industrial, labor, and public relations policies designed to improve company's image and relations with customers, employees, stockholders, and public. (25% of time spent)

Counsel again submitted a list of the petitioner's three sales representatives employed at the time of filing the petition, noting that each was employed between 25 through 36 hours per week. The petitioner's state quarterly wage reports, also submitted with the response, confirmed the employment of the beneficiary and three sales representatives.

In a decision dated June 23, 2003, the director determined that the petitioner did not demonstrate that the beneficiary had been or would be employed by the United States entity in a primarily managerial or executive capacity. The director outlined the job duties to be performed by the beneficiary, and concluded that "[t]he beneficiary's current job description does not establish that the beneficiary primarily directs the management of the organization, establishes the company's policies and goals, exercises wide latitude in discretionary decision-making, and maintains autonomy over the petitioner's operations." The director also considered the petitioner's organizational chart, noting that the employees are mainly sales representatives, and stated "it is unreasonable to believe that the beneficiary as 'President,' with the organizational structure provided, would not be assisting with the day to day non-supervisory duties [of the business]." The director further stated that

the beneficiary's title of president does not dictate whether the position is truly "executive" in nature. The director also concluded that the employees supervised by the beneficiary are not managers or professionals, and noted that the beneficiary was not employed as a functional manager. Consequently, the director denied the petition.

Counsel filed a motion to reconsider on July 24, 2003, stating that the beneficiary has been employed as the "top executive manager" of the petitioning organization, during which he directs the management of the organization, supervises and controls the employees' work, and exercises discretion over the business' day-to-day operations. Counsel also noted that the workers identified by the director in his decision are employees of the foreign entity, not the United States company. Counsel again submitted a list of United States workers for consideration by the director.

On April 14, 2004, the director dismissed the motion, stating:

The motion to reconsider does not state reasons for reconsideration supported by pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition, must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Counsel filed an appeal on April 26, 2004. In a brief submitted on May 25, 2004, counsel claims that the director's finding that the beneficiary does not qualify as an executive or manager is based on "confusion concerning the list of employees of the foreign entity."¹ Counsel references two unpublished AAO decisions, and states that "the relative small size of the company" does not justify denying a petition where the beneficiary is hired as the "organization's top manager." Counsel further notes that as the "top executive manager" of the company, the beneficiary occupies the highest position in the organization. Counsel states:

As the President of the USA entity, the beneficiary is responsible for directing the management, establishing the goals and policies of the organization, and exercising wide latitude in discretionary decision-making. He directs and manages the business affairs of the corporation in the USA. The business affairs are not limited to supervising the store operation which is the largest source of Hebrew material in the west coast. . . . He manages all departments' functions and components of the organization. He is in charge of ordering the merchandise, going over the sales reports to eliminate merchandize [sic] that doesn't sell, looks into purchasing new items for the organization, and is also in charge of all the administrative and financial activities of the organization. . . .

In addition to the above duties he also plans, develops, and establishes policies and objectives of [the] business organization in accordance with board directors. He confers with company official[s] to plans [sic] business objectives, to develop organizational policies[,] to coordinate functions and operations between departments, and to establish responsibilities and procedures for attaining objectives. Reviews activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in

¹ The AAO notes that the director erroneously considered employees of the foreign company as United States workers in his decision.

accordance with current conditions. Directs and coordinates formulation of financial status to provide funding for new and continuing operations to maximize returns on investments, and to increase productivity. Plans and develops industrial, labor, and public relations policies designed to improve company's image and relations with customers, employees, stockholders, and public.

Upon review, the petitioner has not established that the beneficiary would be employed by the United States entity 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 does not clarify whether the beneficiary is claiming to be primarily engaged in 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 must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity. Here, counsel noted in his December 10, 2002 letter that the listed job duties are associated with the beneficiary's position as a "manager or executive." Also, counsel's claim on appeal that the beneficiary is the "top executive manager" fails to clarify whether the petitioner is claiming to employ the beneficiary in a managerial capacity or in an executive capacity.

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 prove 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). Although the petitioner provided a list of the beneficiary's job duties, the record does not support the claim that the beneficiary would devote the majority of his time to performing high-level responsibilities. Upon review of the five job duties outlined in the petitioner's response to the director's request for evidence, the first three tasks seem to describe essentially the same task, i.e., planning and revising business objectives and policies in conjunction with the company's directors. It is therefore implausible that the beneficiary would devote a cumulative 65 percent of his time to performing this executive task, as claimed by the petitioner.² Based on the record, it is also unlikely that the beneficiary would spend what the petitioner claims is 50 percent of his time directing the financial status of the business and planning and developing the company's industrial, labor and public relations policies. As the petitioner has not identified any employees responsible for the petitioner's finances, it is unclear how the beneficiary would actually "direct" this function rather than performing it himself. Additionally, because the beneficiary is responsible for *developing* policies designed to enhance the company's image, it would seem that the beneficiary is also performing all public relations functions for the petitioner rather than directing the performance of these operations by lower-level employees. The AAO notes that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

² The AAO notes that the percentages allocated by the petitioner to each of the beneficiary's tasks exceed 100 percent, and instead amount to 115 percent.

The assumption that the beneficiary would devote the majority of his time to performing non-qualifying operations of the business is further supported by counsel's brief on appeal. Counsel states that the beneficiary would be responsible for ordering the company's merchandise, reviewing sales reports for unprofitable merchandise, and performing research for new products. Counsel further notes that the beneficiary is in charge of the administrative and financial activities of the company. Clearly, the beneficiary is responsible for performing the non-managerial and non-executive functions associated with the operation of the business. The AAO also notes that, although requested by the director, the petitioner neglected to provide descriptions of the job duties performed by the petitioner's three sales representatives. This information is critical as it would have established whether the beneficiary would be relieved of performing any of the above-named non-qualifying operations of the business or whether any of the beneficiary's subordinates serve in managerial, supervisory or professional positions. *See* §101(a)(44)(A)(ii) of the Act. The purpose of the 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). 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).

As previously addressed, counsel also fails to clarify the assertion on appeal that the beneficiary would be responsible for "directing the management" of the company. According to the petitioner's organizational chart and its list of employees, the petitioner employs three sales representatives as lower-level employees. Counsel has offered no evidence that these employees should be considered "managerial," or that the beneficiary is directing any managerial employees. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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* section 101(a)(44)(C), 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.*

Here, the petitioner has not explained how the reasonable needs of its organization may plausibly be met by the services of the beneficiary as president and three sales representatives, who according to the petitioner, are not employed full-time. The petitioner's advertisements indicate that its two retail locations are open six days a week for a total of 104 hours. The record reflects that the petitioner's three sales representatives work a cumulative amount of 88 hours per week. As the petitioner's stores are open for an additional sixteen hours during which no sales representatives are employed, it is evident that the beneficiary would be required to work as a salesperson in either store location. 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) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the

sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. 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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.