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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 00 267 51909 Office: CALIFORNIA SERVICE CENTER Date: JUN 1 8 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center denied the employment-based petition on September 4, 2003. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in August 1994. It facilitates trade between clients in the United States and China. It seeks to employ the beneficiary as its general manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary's assignment would be primarily managerial or executive.

On appeal, counsel for the petitioner asserts that the beneficiary's position meets each of the four criteria set out in the definition of "executive capacity."

Section 203(b) of the Act states in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the petitioner established that the beneficiary's assignment would be in a primarily executive capacity. The petitioner does not claim that the beneficiary's assignment is managerial.

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
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> 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.

In a letter submitted with the petition, the petitioner stated:

> As General Manager, the Beneficiary will direct the day-to-day management of [the petitioner]. He will manage and oversee all business and management aspects of the company, including business development, marketing, budgeting, finance and accounting, advertising, and personnel functions. He will be responsible for the establishment and execution of development contracts with potential investors to the U.S. He also will be primarily responsible for maintaining and improving contractual relations with our current major customers. In addition, to such responsibilities, the Beneficiary will meet with company staff on a regular basis in order to review company policies and procedures and to develop appropriate plans necessary to ensure consistency and efficiency in development in accordance with established company standards.
>
> The Beneficiary will formulate, establish, and direct [the petitioner's] development and marketing policies, strategies, and goals for the U.S. real estate development market. In addition, he will establish and direct accounting, finance and investment, budgeting, advertising, and personnel policies for the company.
>
> As General Manager, the Beneficiary will exercise wide latitude in discretionary decision-making. As discussed above, he will be solely responsible for formulating, establishing and directing the company's policies and strategies concerning development and marketing as well as basic policies concerning financial, accounting, and personnel functions.

> The Beneficiary will be granted virtually autonomous decision-making authority over the U.S. subsidiary. Although he will be responsible for reporting results of the U.S. operations to company shareholders, the Beneficiary will be provided total discretionary authority in determining the actual development programs and goals of the U.S. company. He will receive only general supervision from the parent company's Board of Directors.

The petitioner also submitted an organizational chart showing the beneficiary as general manager and three marketing managers and two sales managers reporting directly to him.

The director requested further evidence including: (1) the petitioner's organizational chart as of September 18, 2000, the date of filing the petition; (2) a brief description of the job duties and educational levels of all employees under the beneficiary's supervision; (3) a more detailed description of the beneficiary's job duties; and (4) the petitioner's California Forms DE-6, Employer's Quarterly Wage Reports, for the third and fourth quarters of 2000 and all fours quarters of 2001, all four quarters of 2002, and the first quarter of 2003.

In response, the petitioner provided the same organizational chart previously submitted. The petitioner stated that the petitioner "arranges for foreign officials and individuals planning to do business in the United States to network with U.S. companies, institutions and organizations." The petitioner added that the company "helps clients in gathering knowledge of American business practices and facilitating formation of business networks within the U.S. market." The petitioner listed the beneficiary's basic duties and responsibilities:

- Direct complex market analysis;
- Formulate business development programs to secure clients;
- Network within the U.S. market to promote the company's image and develop partnership relations;
- Oversee the establishment of strategic business plans;
- Evaluate business progress and review stated corporate goals;
- Meet with contacts for the creation of potential business deals;
- Evaluate the effectiveness and profitability of all business activities;
- Allocate funds to necessary resources and expenses;
- Create budgets to ensure that expenditures remain within stated limits;
- Oversee statistical analysis regarding business growth and development;
- Review new business proposals and investments; and
- Coordinate overall business operations.

The petitioner's California Form DE-6 for the third quarter 2000 showed the employment of the beneficiary and an individual identified as a sales manager on the petitioner's organizational chart. The petitioner's 2001[1] Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, showed $26,800 in compensation to the beneficiary and $11,000 paid in salaries.

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[1] The petitioner's fiscal year begins July 1 of each year and ends June 30 of each year.

The director determined that: (1) the beneficiary's job description did not establish that the beneficiary would be employed primarily in a manager or executive capacity; (2) the beneficiary's position was a first-line supervisory position over non-professional employees; and, (3) the petitioner had not established that the beneficiary would be a functional manager.

On appeal, counsel for the petitioner acknowledges that the beneficiary performs some non-supervisory duties but asserts that the beneficiary's primary duties are executive. Counsel provides excerpts from the Mississippi Code describing the duties of a chief executive officer of a corporation. Counsel also references articles that describe the day-to-day responsibilities of an executive. Counsel contends that the petitioner has supplied sufficient evidence to show that the beneficiary's duties "consist of management of the successful operation of the corporation by implementing and setting directional strategy, financial management and human resource management." Counsel claims that in a small organization like the petitioner, the reasonable needs of the petitioner require that the beneficiary perform some of the petitioner's functions, but that the beneficiary's primary duties are executive.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In this matter the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "manag[ing] and oversee[ing] all business and management aspects of the company, including business development, marketing, budgeting, finance and accounting, advertising, and personnel functions," and "meet[ing] with company staff on a regular basis in order to review company policies and procedures and to develop appropriate plans necessary to ensure consistency and efficiency in development in accordance with established company standards." The petitioner did not, however, define the goals, policies, strategies, or clarify who actually performs the marketing, budgeting, finance and accounting, advertising, and personnel functions. 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). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In addition, rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased portions of the statutory definition of managerial and executive capacity. *See* section 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44)(A) and (B). For instance, the petitioner indicated the beneficiary "will formulate, establish, and direct [the petitioner's] development and marketing policies, strategies, and goals for the U.S. real estate development market," and "will establish and direct accounting, finance and investment, budgeting, advertising, and personnel policies for the company," and "will exercise wide latitude in discretionary decision-making," and "will receive only general supervision from the parent company's Board of Directors." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava, supra*; *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The petitioner states that the beneficiary is responsible: (1) for establishing and executing development contracts with potential investors to the U.S and for maintaining and improving contractual relations with current major customers; (2) networking within the U.S. market to promote the company's image and develop partnership relations; (3) meeting with contacts for the creation of potential business deals; and, (4) allocating funds to necessary resources and expenses. These duties suggest that the beneficiary is responsible for providing the petitioner's essential services. 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).

Further, in response to the director's request for evidence, the petitioner stated that its function was to "arrange for foreign officials and individuals planning to do business in the United States to network with U.S. companies, institutions and organizations," and "[help] clients in gathering knowledge of American business practices and facilitating formation of business networks within the U.S. market." This description of the petitioner's business suggests that the petitioner primarily provides consulting services. When the petition was filed, the petitioner's California Form DE-6 showed that the petitioner employed only the beneficiary and a sales manager. The petitioner does not provide other documentary evidence establishing that it employed other individuals when the petition was filed. The California Form DE-6 contradicts the number of employees listed on the petitioner's organizational chart. 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). The record does not demonstrate who in the organization actually performs the petitioner's consulting services if not the beneficiary and intermittently employed personnel. Based on the record, the AAO must conclude that it is the beneficiary who primarily performs the consulting services.

Moreover, counsel acknowledges that the beneficiary performs some of the petitioner's basic operational services but seems to suggest that since the beneficiary is also the head of the company, the beneficiary's position is elevated to that of an executive. However, the petitioner fails to document what proportion of the beneficiary's duties would be executive functions and what proportion would be non-executive. The petitioner lists the beneficiary's duties as executive, but it fails to quantify the time the beneficiary spends on them. This failure of documentation is important because the record reveals that the beneficiary is the employee negotiating the contracts, marketing the petitioner's service, arranging the meetings, networking, and generally providing the petitioner's essential services.[2] These day-to-day operational duties do not fall directly under traditional executive duties as defined in the statute. The AAO cannot conclude that the

[2] Counsel's submission of a list of duties comprising the duties of a chief executive officer as determined by the State of Mississippi and by a claimed management expert is not relevant. In this matter, the petitioner has also provided such a list to describe the beneficiary's tasks. However, the duties outlined are general and nonspecific. The duties do not provide an understanding of the beneficiary's actual day-to-day duties. Thus, the AAO must consider the petitioner's business and its number of employees to assist in determining whether the petitioner has sufficient employees to relieve the beneficiary from performing primarily the operational services of the organization.

beneficiary is primarily performing the duties of an executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Although the petitioner asserts that the beneficiary directs the management of the organization, the record does not establish that the petitioner had sufficient staff to relieve the beneficiary from providing the petitioner's services. 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 Citizenship and Immigration Services (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 sum, the petitioner has not provided evidence to demonstrate that the beneficiary's assignment is primarily executive rather than primarily operational.

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.