



U.S. Department of Justice
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

B4



Public Copy

JAN 18 2001

File: [Redacted] Office: California Service Center Date:

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)

IN BEHALF OF PETITIONER: [Redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

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

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, California Service Center. Upon further review, the director determined that the beneficiary was not clearly eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of her intent to revoke approval of the visa petition, and her reasons therefore, and ultimately revoked the approval of the petition. This matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner, a company engaged in manufacturing interactive entertainment software, seeks classification of 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, to perform services as its senior audio specialist. The director determined that the petitioner had not established that the beneficiary had been employed in an executive or managerial capacity.

On appeal, counsel argues that the Service failed to consider previously-submitted evidence demonstrating that the beneficiary has been employed in a primarily managerial or 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 the alien 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.

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.

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.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

"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:

"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.

At issue is whether there is sufficient evidence to demonstrate that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

In a letter dated February 2, 1998, the petitioner indicated that the beneficiary was employed as a functional manager and lead audio resource in the "need for speed" product line, and describes the beneficiary's duties with the foreign entity as follows:

Since 1994, Mr. [REDACTED] has served as the lead audio resource in the development of the "Need for Speed" product line. He is completely familiar with the audio code, audio technology and the code libraries for his product. His transfer to the U.S. is in connection with the continued management of product development for "Need for Speed" which will be further developed and marketed out of the Seattle area office.

During this period, Mr. [REDACTED] served as a "functional manager" in the development of an integral aspect of the "Need for Speed" product line. He was given considerable discretionary authority to supervise other engineers and staff in the execution of day-to-day development tasks. He also was given discretionary authority over the hiring and supervision of outside contractors and established the artistic and technical direction of the game. Mr. Hirst supervised numerous professional engineers and consultants and was responsible for their productivity and performance. He also provided training to subordinate engineers, designers and audio specialists in development methods. In addition, he provided technical leadership in Electronic Arts product development efforts for the "Need for Speed" and other product lines by establishing the audio portion of each game as an integral entertainment component of a game, rather than as a drab background filler. In this capacity, he provided both artistic and technical direction and leadership to the audio component of entertainment software and which has now become an essential component of Electronic Arts products and resultant revenues.

In a letter dated November 9, 1998, the petitioner was requested to respond to the following:

Submit the foreign company's organizational chart from the time when the beneficiary was employed as a "functional manager" (1994-1996). The chart must indicate the beneficiary in relation to all his subordinate employees, as well as his superior employees. The chart must also indicate every employee's job title that they were given at that time.

In addition, the petitioner must submit position descriptions from the petitioner's personnel department for the beneficiary (Audio Engineer II) and all his subordinate employees that were in existence back in 1994-1996, and NOT created recently as a result of this petition. The position descriptions must show the educational requirements, including specific college degrees, for the beneficiary and all his subordinate employees.

The petitioner submitted the following description of the beneficiary's employment history with the foreign entity from February of 1992 to July of 1996:

- Act as Lead Audio on game development [sic] team, supervising team of audio personnel
- Program complex original game code and tools, and conversions thereof, to integrate audio elements into products on a variety of computer platforms. Develop well-designed and documented software within schedule.
- Compose and produce original CD-quality music tracks in the recording studio, being able to engage in complex use of the studio facilities.
- Develop sound effects on target hardware appropriate for the game, both through original creation as well as sourcing from libraries of pre-recorded material.
- Engineer the post-production of video clips used in games, operating digital recording equipment.

The petitioner submitted the following chart for the "Need for Speed I (3DO)" project on which the beneficiary was employed:

General Manager: [REDACTED]
Producer: [REDACTED]
Audio Specialist II: [REDACTED]
Audio Software Engineer II: [REDACTED]

Composer III: [REDACTED]
[REDACTED] Productions Outside contract audio group

The petitioner also submitted the following chart for the "Need for Speed I (PC/PSX)" project:

General Manager: [REDACTED]
Producer: [REDACTED]
Audio Specialist II: [REDACTED]
Composer III: [REDACTED]
Composer II: [REDACTED]
Outside contract audio support: [REDACTED]
Outside contract audio support: [REDACTED]

The petitioner submitted two other project charts showing that the beneficiary was employed as an audio specialist, and a description of the primary responsibilities of an audio specialist III, his most recent position with the foreign entity:

-Act as Lead Audio on projects, overseeing other members of the audio department working on the team/and/or outside contractors. Co-ordinate audio efforts with the technical and art leads to help with design and bring product to completion within schedule and budget.

-Program complex original game code and tools, and conversions thereof, to integrate audio elements into products. Develop well-designed and documented software within schedule.

-Develop technical capabilities on all major game systems. Engage in research and advanced studies to extract the most out of each new system by taking advantage of platform specific audio features.

-Compose and produce original CD-quality music tracks in the recording studio, being able to engage in complex use of the studio facilities. Use in-house orchestration tools to arrange music to achieve optimum results for target machine.

-Develop sound effects on target hardware appropriate for the game, both through original creation as well as sourcing from libraries of pre-recorded material.

-Engineer the post-production of video clips used in games, operating digital recording equipment.

-Own the creation of the Audio portion of the TDR document, and ensure a workable integration with the

design, programming, and graphic art elements of the product.

-Actively participate with team and production group by consulting on all audio issues (technical, creative, staffing, etc.), contribution to project status meetings, making recommendations on how to improve product quality as well as group productivity.

-Coordinate with other studio groups including other company audio talent, Studio Coordinator, and tools and libraries groups to achieve project objectives.

-Review and evaluate the work of other Audio Specialists, as well as qualifying audio resources (staff and systems) for incorporation into the production group. Take leadership in the training and supervision of other members of audio department in all major platforms for which the group develops products.

-Directly responsible for adhering to all company policies and procedures.

-Perform any other duties as assigned by manager with accountability and responsibility defined prior to the commencement of these duties.

The petitioner also provided a description of the duties of its other employees.

The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. There is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. Duties described as acting as lead audio on projects; coordinating audio efforts to design and bring product to completion; and overseeing other members of the audio department working on the team, are without any context in which to reach a determination as to whether they would be qualifying. Other duties such as programming complex original game code and tools, developing software within schedule; developing technical capabilities on all major game systems; engaging in research and advanced studies to take the most out of each new system by taking advantage of platform specific audio features; composing and producing music tracks; developing sound effects on target hardware; engineering the post-production of video clips used in games; operating digital recording equipment; ensuring a workable integration with the design, have not been demonstrated to be managerial or executive in nature. The use of the position title of "senior audio specialist" is not sufficient.

Further, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who relieved him from performing nonqualifying duties. The petitioner claims that the beneficiary supervised three other professionals, but many of the duties of the beneficiary overlap with those of the employees stated to be his subordinates. For example, the beneficiary and the composer coordinate with other departments to achieve project objectives, compose original music scores, provide audio consulting to production groups, provide input to TDR, and develop sound effects on target hardware. Further, the beneficiary, as an audio specialist III, and the subordinate audio specialist II develop technical capabilities on target machines, compose music tracks or scores, develop sound effects on target hardware, engineer the post-production of video clips used in games, and program game code. The delineation between the duties of the beneficiary and the petitioner's other employees is unclear.

When managing or directing a function, the petitioner is required to establish that the function is essential and the manager is in a high-level position within the organizational hierarchy, or with respect to the function performed. The petitioner must demonstrate that the function is not directly performed by the executive or manager. Although counsel argues that the beneficiary controls an essential function, (i.e., the development of the "Need for Speed" product line), the record does not demonstrate that the beneficiary was primarily managing or directing, rather than performing the function of developing the product line. The record must further demonstrate that there were qualified employees to perform the function so that the beneficiary was relieved from performing non-qualifying duties. As stated above, it appears that the beneficiary was actually composing, programming, and developing the petitioner's product. Absent details concerning the position descriptions, hours worked, and wages of subordinate or independent contract employees, the record fails to establish that the beneficiary has been managing rather than performing the function. The petitioner has not established that the beneficiary has been employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

On appeal, counsel argues that the Service "failed to identify the indicia of ineligibility which triggered its review of Mr. Hirst's immigrant visa petition," and claims that the Service did not demonstrate that the director's decision is supported by the record. Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988). The Service may review a file on its own initiative, and is not dependent on an outside "trigger" or event to prompt such a review. As discussed above, the record shows that the petitioner has submitted insufficient evidence to demonstrate that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the decision of the director will be affirmed, and the petition will be denied.

ORDER: The appeal is dismissed.