

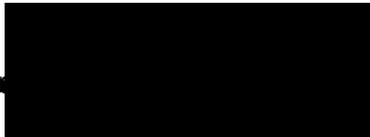


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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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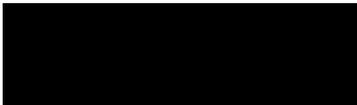


File: [redacted] Office: NEBRASKA SERVICE CENTER Date: 12 APR 2002

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:



Public Copy

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

for Robert P. Wiemann, Director
Administrative Appeals Office





DISCUSSION: The Director of the Nebraska Service Center denied the immigrant visa petition and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a North Dakota real estate developer that seeks to employ the beneficiary as its president and, therefore, endeavors 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 director denied the petition because the evidence in the record did not support a finding that the petitioner currently employs and would continue to employ the beneficiary in a primarily managerial or executive capacity.

On the I-290B appeal form that counsel filed on January 27, 2000, counsel submitted a brief statement and indicated that a brief and/or evidence would be submitted to the Administrative Appeals Office (AAO) within 30 days. As of this date, however, no additional evidence has been received into the record of proceeding. Therefore, the record is considered complete, and a decision will be rendered on the evidence currently before the Service.

On appeal, counsel states, in part, that the beneficiary's duties are primarily executive or managerial and that the petitioner has generated a significant number of American jobs.

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.

When the petitioner filed the I-140 petition on April 20, 1999, it indicated on the petition that it employed only one person, who

was the beneficiary. Therefore, the director requested that the petitioner submit additional information about how the petitioner's routine daily tasks were accomplished. In response, the petitioner's attorney stated that the beneficiary spent approximately 75% of his time working on executive or managerial activities and approximately 25% of his time on tasks that "in a larger or more established organization would be handled by professional and technical staff." Based upon this evidence, the director concluded that the proffered position was neither primarily executive nor managerial in nature. The director further noted that the petitioner had not created jobs for American citizens, which is a "prime purpose" of the beneficiary's E-2 nonimmigrant classification.

On appeal, counsel states that the petitioner has generated a significant number of American jobs and that the beneficiary "spends virtually all of his time exercising executive and managerial authority." As previously stated, although counsel had indicated that additional evidence would be forwarded for inclusion in the record, no further evidence has been received. As the record is presently constituted, the Service does not find that the proffered position meets the definition of executive capacity or managerial capacity.

Pursuant to 8 C.F.R. 204.5(j)(2):

Executive capacity means an assignment within an organization in which the employee primarily:

- (A) Directs the management of the organization or a major component or function of the organization;
- (B) Establishes the goals and policies of the organization, component, or function;
- (C) Exercises wide latitude in discretionary decision-making; and
- (D) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Managerial capacity means an assignment within an organization in which the employee primarily:

- (A) Manages the organization, or a department, subdivision, function, or component of the organization;
- (B) 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;

- (C) 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
- (D) Exercises direction over the day-to-day operations of the activity or function for which the employee has authority.

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. I.N.S., 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir.(Wash.)).

The petitioner fails to establish that the beneficiary works in an executive or managerial capacity because the evidence does not indicate that the beneficiary primarily directs the management of the organization or a major component or function of the organization, or manages the petitioner or a function of its operations.

According to counsel, the beneficiary devotes approximately 75% of his time to executive and managerial activities. Counsel states that these activities fall into the broad categories of executive duties, financial duties, and operational duties. Counsel provides a description of the types of duties that would fall within each of the broad categories and states that:

As [the petitioner's] chief executive, once [the beneficiary] decides what needs to be done, he determines first whether he can do the work himself or whether an independent contractor - attorney, accountant, engineer, builder, contractor or other service provider - can more efficiently do the job. If it makes business sense for [the beneficiary] to do the work himself, he simply delegates himself the job and completes it. If contracting out the work is preferable, [the beneficiary] hires the appropriate service provider and oversees completion of the job. . . . [M]any of the day-to-day tasks are incidental and [the beneficiary] is technically proficient and able to

do them.

While it appears that the beneficiary has discretionary decision-making authority over matters that impact on the petitioner, this, by itself, does not establish that the beneficiary works in a primarily or executive capacity. Counsel's explanation of the beneficiary's current and proposed role with the petitioner indicates that the beneficiary would perform the day-to-day tasks of the petitioner's operations if the beneficiary believed that it would be more efficient and cost-effective for him to do so. Thus, the Service does not find counsel's claim that the beneficiary spends approximately 75% of his time devoted to executive and managerial activities to be a realistic job description in light of counsel's claims.

If the beneficiary is performing duties that would normally be performed by an engineer, a builder or a contractor, then the beneficiary is performing the services of the petitioner and not managing the execution of those services by others. 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 (BIA 1988).

Furthermore, while counsel claims that the beneficiary uses contracted workers such as attorneys, accountants and builders, to assist him in carrying out the petitioner's operations, the petitioner has not submitted any documentary evidence to support this claim. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). Accordingly, the Service is not persuaded to find that the beneficiary primarily manages the petitioner's operations, a function of the petitioner's operations, or directs the management of the petitioner's operations. Thus, the director's decision will not be reversed.

The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.