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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
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Washington, D.C. 20536



File: WAC 99 003 52693

Office: CALIFORNIA SERVICE CENTER

Date: 23 APR 2002

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)

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 California 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 California corporation that sources, purchases and exports high technology equipment to Russia. It 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 appeal, counsel submits a brief. Counsel states, in part, that the beneficiary's duties are primarily executive or managerial in nature because the beneficiary manages an essential function within the petitioning entity's operations.

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 director denied the petition because the petitioner described the beneficiary's proposed job duties in broad and general terms. In particular, the director noted that the petitioner did not detail the actual duties to be performed by the beneficiary and the percentage of time devoted to those duties. In addition, the director concluded that the beneficiary was only a first-line supervisor to a non-professional employee, who was the bookkeeper.

On appeal, counsel states that the beneficiary manages an

essential function of the petitioner's operations. Counsel states that the beneficiary has:

[E]stablished all the administrative and financial goals of [the petitioner], delegated company responsibilities, and exercised a wide latitude in discretionary decision-making. He continues to supervise all employees, the number and location of which have changed with the Russian economy and focus of [the petitioner's] business. . . .¹

Counsel cites an unpublished Administrative Appeals Office (AAO) decision (Irish Dairy Board) in support of his claim that the beneficiary may be classified as a multinational executive or manager even though the beneficiary does not supervise any managerial, supervisory or professional employees. Counsel argues that the beneficiary manages an essential function because the day-to-day administrative activities are delegated to the petitioner's employee and the employees who work in the parent company in Russia. Thus, counsel argues, the beneficiary does not perform the essential function that he manages.

In support of counsel's claims, the petitioner presents a letter from [REDACTED] a professor of Management and Information Systems at the University of San Francisco. According to professor Efendioglu, the beneficiary's job falls within the definitions of executive and managerial capacity because "all of his duties are at a managerial level, and his job involves significant authority over the general policies of both the California and Russia based companies." Professor Efendioglu further states that "[t]here is no question in my mind that, while [the beneficiary] has complete authority and responsibility over all functions of the enterprise, he is not performing the function he is managing."

Finally, counsel suggests on appeal that the Service has previously recognized that the proffered position is in an executive or managerial capacity because the Service has granted the beneficiary L-1A nonimmigrant classification based upon the same facts that are included in this immigrant petition.

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

¹ Counsel notes on appeal that the staffing level of the petitioner has changed over the years due to the changes in the Russian economy. According to counsel, the beneficiary supervises one employee in the petitioner's operations and three employees in the Russian parent company. However, counsel claims that the beneficiary manages an essential function and does not claim that the beneficiary supervises managerial, supervisory or professional employees.

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 believes that the beneficiary qualifies for this immigrant visa classification because he either directs the

management of an essential function or manages an essential function. In this case, the essential function to which the petitioner refers is the petitioner's export of products to Russia.

While it appears that the beneficiary has discretionary decision-making authority over company decisions, there is no evidence that the beneficiary's primary responsibility is to either direct the management of an essential function or manage an essential function.

The Service notes that the petitioner is in the business of exporting products to Russia. However, the petitioner has not explained who purchases the products that the petitioner exports, how the products are identified for purchase, who negotiates the price of the purchased products, or who arranges for the shipping of the products to Russia. As the petitioner's sole employee, other than a bookkeeper, the beneficiary would appear to perform these 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 (BIA 1988).

The Service's conclusion is supported by information in the beneficiary's job description, which states that the beneficiary:

Establish[es] all administrative and financial goals of [the petitioner], delegate[s] company responsibilities, exercise[s] a wide latitude of discretionary decision making supervising all employees. [Is] responsible for marketing, business negotiations and hiring, firing, researching and initiating communication with U.S. Vendors and banks and negotiating contracts.

The petitioner lists some of the beneficiary's duties as marketing, research, negotiating contracts, and liaising with vendors and banks. None of these duties is an executive or managerial level function, as they are the necessary day-to-day duties that would normally be performed by a sales or marketing representative, or an administrative assistant. Thus, the Service finds that the beneficiary does not primarily direct the management of or manage an essential function of the petitioner's operations. Rather, the beneficiary performs the services that are needed in order for the petitioner to operate.

On appeal, counsel argues that the facts in this case are similar to the facts in Irish Dairy Board because the Service has held that even a sole employee can be found to be eligible as a multinational executive or manager if he is using outside independent contractors to accomplish daily work. Counsel's argument is flawed, however, because while 8 C.F.R. 103.3(c) provides that Service precedent decisions are binding on all

Service employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, the petitioner, while never claiming to employ outside contractors, has not submitted documentary evidence to show that it employs a sufficient staff of contracted employees who handle the petitioner's routine administrative, clerical, or non-managerial/non-executive tasks.

Regarding the letter from Professor Efendioglu about his opinion of the proffered position, it does not contain any persuasive evidence or arguments on the issue of whether the beneficiary works in a primarily executive or managerial capacity. The Service may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. Matter of Caron International, 19 I&N Dec. 791 (Comm. 1988).

Professor Efendioglu states that his opinion is based upon documents provided by the petitioner, documents provided by the beneficiary, a personal interview with the beneficiary, and other evidence. The professor does not describe the documents that the petitioner and the beneficiary submitted to him in order for the Service to review whether such evidence is similar or identical to the evidence in this record of proceeding. Accordingly, the professor's opinion is accorded little weight in the disposition of this appeal.

Based upon the above discussion, the Service is not persuaded to find that the beneficiary primarily directs the management of or manages an essential function of the petitioner's operations. While counsel maintains that the beneficiary's work in a primarily executive or managerial capacity has been recognized by the Service through its approval of L-1A petitions in the beneficiary's behalf, it is noted that the Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the contradictory decision of a service center. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La. 2000), aff'd, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S. Ct. 51 (U.S. 2001). 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.