

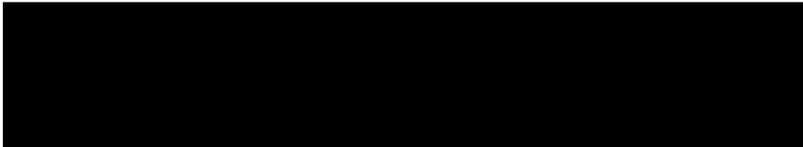


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U.S. Department of Justice
Immigration and Naturalization Service

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



File: WAC 01 062 53212 Office: CALIFORNIA SERVICE CENTER

Date: JAN 22 2003

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

Myra L. Rosenz
for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the employment-based preference visa 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 is engaged in specialized services within the outdoor advertising industry. It seeks to employ the beneficiary as its vice President and Chief Executive Officer (CEO) and, therefore, endeavors to classify the beneficiary as a multinational executive or manager 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 on the bases that (1) the proffered position is neither executive nor managerial in nature, and (2) the petitioner is not doing business.

On appeal, counsel submits a brief and additional evidence.

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.

In the initial petition filing, the petitioner described itself as a provider of research expertise and developer of technical solutions for companies that advertise in an outdoor forum. The petitioner claimed to employ three persons and to have, along with its alleged affiliate company in Italy, a gross annual income in excess of \$7.5 million. The petitioner stated that the proffered position was an executive position and the duties of the beneficiary would include directing expansion activities, directing the day-to-day operations of the company, overseeing the hiring and firing of employees, and representing the petitioner in contract negotiations.

The director issued to the petitioner two separate requests for

evidence (RFE). The first RFE related to beneficiary's duties with the foreign entity and the foreign entity's ownership. The second RFE related to whether the proffered position was executive or managerial in nature, and whether the petitioner had been doing business.

Regarding the proffered position, counsel stated that:

[the beneficiary] has ultimate control over all company decisions, including establishing and implementing company goals and policies, representing the company in contract negotiation and execution, implementing marketing and public relations plans, entering into corporate partnerships, hiring outside resources to implement company business plans and marketing, developing strategic plans, and overseeing the financial operations of the company.

The petitioner also submitted a list of activities that the beneficiary had executed in his role as the President/CEO to evidence that the proffered position involved primarily executive or managerial duties. Counsel also stated that the petitioner employed one full-time operations manager in addition to the beneficiary. According to counsel, the operations manager implements all directives in connection with the operations, policies, and goals of the company, maintains the petitioner's operations when the beneficiary is in Italy, arranges and participates in meetings with accountants, lawyers and clients, and prepares summary reports about outside advertising accounts and overseas marketing and business activities. Finally, counsel noted that the petitioner hires independent contractors and "critical service personnel" to handle advertising design, website development, legal and financial activities, and insurance issues.

Regarding whether the petitioner had been doing business, counsel submitted copies of the petitioner's federal income tax returns from 1998 through 2000.

The director found that the proffered position was neither executive nor managerial in nature and that the petitioner had not been doing business. The director's reasons for denial and counsel's evidence in rebuttal shall be separately addressed below.

I. PROFFERED POSITION WITH THE U.S. ENTITY

The director stated that the proffered position was neither executive nor managerial in nature because ". . . given the type of business that the petitioner conducts, it is unreasonable to believe that the beneficiary, as the President and CEO, will not be involved in the day-to-day non-supervisory duties that are common place in the industry." The director found that the beneficiary would be working at "the lowest level" of the

petitioner's organizational hierarchy because there are no permanent full-time employees other than the operations manager whom the director concluded was the beneficiary's assistant.

On appeal, counsel states that the beneficiary spends 95% of his time performing managerial and executive activities, which include negotiating contracts, representing the petitioner in meetings, hiring and directing legal counsel and financial planning, and directing the operations manager as well as a staff of independent contractors in the areas of design and marketing.

Counsel also states that the director erred in focusing on the size of the petitioner's staffing levels. According to counsel, the operations manager is a full-time employee with a bachelor's degree who carries out the day-to-day activities of the company's operations, which are based upon the policies and directives that the beneficiary creates and directs. Counsel notes that the director failed to consider the reasonable needs of the petitioner in light of its structure and overall stage of development. Counsel maintains that the petitioner relies upon a corps of contractual employees such as graphic artists and marketing professionals to fulfill its business needs and, as such, the petitioner does not need to hire a permanent staff to meet its business obligations. In support of her statements, counsel refers to two unpublished decisions by the Administrative Appeals Office (AAO).

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.) July 30, 1991) (emphasis in original).

The evidence in the record shows that the beneficiary performs the high level responsibilities that are specified in the definition of executive capacity; the beneficiary directs the management of the petitioner, establishes the petitioner's goals and policies, exercises discretion over the petitioner's daily operations, and works independently. However, the Service cannot conclude that these responsibilities are the primary focus of the beneficiary's job responsibilities.

If staffing levels are used as a factor in determining whether an individual is an executive or manager, section 101(a)(44)(C) of the Act requires the Service to consider the reasonable needs of the organization in light of its overall purpose and stage of development. 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. Systronics Corp. v. I.N.S., 153 F.Supp.2d 7 (D.D.C. 2001).

Here, the petitioner's staffing level includes the beneficiary as the president/CEO and an operations manager. Counsel states that the beneficiary is not involved in performing the services of the petitioner because they are contracted out to independent contractors. In support of this claim, the petitioner submits a list of alleged independent contractors and identifies which

services these companies perform. However, the petitioner has not submitted documentary evidence of its agreement with these contractors to show that the alleged relationship between it and the contractors exists. Furthermore, the petitioner has not listed the type of service(s) that each of these contractors provides, or explained how the contractors' services obviate the need for the beneficiary to be involved in the daily operational activities of the petitioner's operations. 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).

More importantly, however, the list of independent contractors indicates that the petitioner contracts for IT services, export/logistics, office insurance, legal services, accounting services and design services; yet, the petitioner is in the business of marketing and selling its services to businesses who use outdoor advertising. It is obvious that the petitioner does not contract its marketing and sales services because the beneficiary performs these duties; such activities are his primary focus. Thus, the petitioner's staffing levels indicate that the reasonable needs of the petitioner in light of its overall stage of development did not require the services of an individual who would primarily execute executive or managerial duties. Such high level responsibilities are secondary ancillary to the beneficiary's primary role as the petitioner's salesperson and marketer of its 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).

It is noted that the petitioner submits a letter from [REDACTED] the President of [REDACTED] states that the beneficiary does not engage in design or other "hands-on" marketing or sales work. According [REDACTED] such duties are handled by professional graphic designers and public relations persons, and he maintains that the beneficiary works as an executive. 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 give weight to that evidence. Matter of Caron International, 19 I&N Dec. 791 (Comm. 1988). Here, [REDACTED] has not presented any evidence to support his claims that the beneficiary does not engage in sales work. In fact, Mr. Andrews claim that the petitioner engages public relations persons to handle its marketing or sales is inconsistent with the petitioner's submitted evidence. In its list of contract employees, the petitioner did not indicate that it hired any public relations persons or firms as contractual employees. Accordingly, Mr. Andrews letter is given no weight in a

determination of whether the beneficiary primarily executes executive or managerial duties.

Finally, counsel's citation of two unpublished decisions from the AAO is neither persuasive evidence nor binding precedent in these proceedings. 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.

For the reasons noted above, the director's decision to deny the petition, in part, on the basis that the proffered position is neither primarily executive or managerial in nature will not be disturbed.

II. DOING BUSINESS

The director also denied the petition on the basis that the petitioner was not engaged in the regular, systematic and continuous provision of goods and/or services. According to the director, the evidence that the petitioner submitted, which included income tax returns, did not show that any business transactions transpired or were finalized. The director noted that the petitioner had only entered into discussions and negotiations for business and he concluded that the petitioner was merely an agent for the foreign entity.

On appeal, counsel notes that the petitioner's federal income tax return for the year 2000 showed a gross annual income of \$850,000. Counsel also states that the director has been notified by the Service's headquarters office to cease issuing denials based upon the issue of "doing business" if a petitioner can show that it has earned an income on its federal income tax return.

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

Doing business means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

Counsel does not present any documentary evidence of an alleged Service policy, which states that a petitioner need submit only a copy of its federal tax returns to show that it has been engaged in the regular, systematic and continuous provision of goods and/or services. The assertions of counsel do not constitute evidence. Matter of Obaiqbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980).

While the petitioner's income tax returns show that it had a gross annual income of \$850,000, the petitioner does not show from where this income was derived. If such income was derived

from only one or two transactions then the petitioner would not be regularly, systematically and continuously engaged in the provision of goods and/or services. The petitioner submits copies of invoices; however, these invoices are all dated subsequent to the filing of the petition. Accordingly, the petitioner has not met its burden of proving that it has been doing business, as that term is defined in the regulations. The petitioner has not overcome this basis of the director's objections to the approval of the petition.

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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.