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U.S. Department of Homeland Security
Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass. Ave., 3rd Floor
425 Eye Street N.W.
Washington, D.C. 20536



FILE: WAC 01 284 54377 Office: CALIFORNIA SERVICE CENTER Date:

DEC 17 2003

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)

ON BEHALF OF PETITIONER:



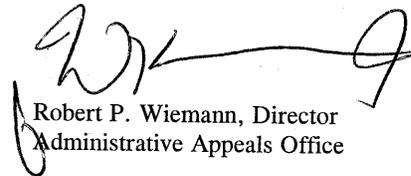
INSTRUCTIONS:

This is the decision 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.

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 that 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 Citizenship and Immigration Services (CIS) 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was incorporated in 1998 in the State of California and is claimed to be a wholly-owned subsidiary of [REDACTED] located in Japan. The petitioner is engaged in the business of importing and exporting scissors and related items. It seeks to employ the beneficiary as its president. 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 had been or would be employed in a managerial or executive capacity.

On appeal, counsel submits a statement refuting the director's findings.

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 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 issue in this proceeding is whether the beneficiary has been and will be performing managerial or executive duties.

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

The term "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:

The term "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.

In the initial filing, the petitioner described the beneficiary's duties abroad and in the United States as follows:

Abroad Duties:

[R]esponsibility for making plans and decisions regarding the company's overseas marketing, sales and distribution activities in line with the company's policies and technical standards. She was also the person in charge of overseeing distribution of Utsumi brand products to the U.S. and other overseas markets. She was also responsible for the negotiation for sales agreements with foreign buyers and suppliers including terms and conditions of sale, prices, and delivery dates. In addition she was responsible for reviewing

letters of credit and other documents of acceptance for the export of merchandise.

Prospective Duties:

- Establishment and administration of all business goals and plans for our business. She will assign functions, job duties, goals and policies to local personnel in an effort to expand our sales and purchasing opportunities in the American market place;
- Final control over the company budget. She will supervise and oversee local employees assigned the task of working with local banks and financial institutions to develop lines of credit and borrowing capabilities for the company as well as overseeing the preparation of both long and short term budget and cash flow projections in order to provide for the orderly and efficient operation of the company in the United States;
- Final and ultimate decision making authority over all financial and accounting practices of [the petitioner]. She will make all final budget and economic decisions based on financial projections and models submitted to the board of directors. In addition, she will communicate directly with the senior management of the parent corporation in Japan, to ensure that all company fiscal policies and procedures comply with those of the parent corporation;
- Responsibility for developing and maintaining short and long term budgets, sales projections and overseeing the preparation of market surveys to ascertain market trends and potential business growth areas for future business expansion.

On January 29, 2002, the director instructed the petitioner to submit organizational charts for the foreign and U.S. entities, each identifying the beneficiary's position within the

respective organization's hierarchy. The petitioner was also asked to provide a more detailed description of the beneficiary's job duties, indicating the percentage of time spent performing each duty, a list of all employees under the beneficiary's supervision, their job titles, brief job descriptions, education levels, and their salaries and wages.

In response to the above, the petitioner provided the following additional description for the beneficiary's position in the United States:

- Establishment and administration of all business goals and plans for the company (20%)
- Assigning functions, and job duties to employees, supervising all management level employees and reviewing department progress reports. Developing overall company personnel goals and policies, establishing and implementing employment decisions. Hiring and termination of all U.S. company employees (25%);
- Final control over the company budget. Direct and oversee local employees assigned the task of working with local banks and financial institutions to develop lines of credit and borrowing capabilities for the company as well as overseeing the preparation of both long and short term budget and cash flow projections. Meeting with outside accountants and other professionals to insure that all tax returns and other government mandated financial reports are properly filed and paid (20%);
- Final and ultimate decision making authority over all financial and accounting practices of [the petitioner]. Responsibility for all accounts payable, accounts receivable, budget and economic decisions (10%);
- Responsibility for direct communication with the senior management of the parent corporation in Japan, to ensure that all company policies and procedures comply with those of the parent corporation (10%); and

- Responsibility for making[,] reviewing[,] and approving all management decisions of the company with respect to sales policies, marketing strategies, hiring and termination of outside sales personnel and independent contractors. Hiring of marketing consultants. Establishing sales goals and projections (15%).

The petitioner also provided organizational charts for the U.S. and foreign entities, indicating the beneficiary's position within each respective entity. However, the foreign chart does not contain the job titles of the beneficiary's subordinates. The chart indicates only that the beneficiary and her subordinates worked in the import and export department. The petitioner also failed to provide, for either entity, job descriptions of the beneficiary's subordinates. It is noted that failure to submit requested evidence which precludes a material line of inquiry, as the petitioner did in the instant case, shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The director denied the petition, basing his decision, in part, on the following conclusion:

[T]he petitioning entity does not have a reasonable need for an executive because they are merely an import and wholesale business. This type of business does not require or have a reasonable need for an executive because all they do is buy and sell products. Additionally, it is contrary to common business practice and defies standard business logic for such a company at best with five employees to have an executive, let alone three.

Although the appeal will be dismissed, it must be noted that the director based his decision, in part, on an improper standard. The director's above comments are inappropriate. The director should not hold a petitioner to his undefined and unsupported view of "common business practice" or "standard business logic." The director should instead focus on applying the statute and regulations to the facts presented by the record of proceeding. Although CIS must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the

director must articulate some reasonable basis for finding a petitioner's staff or structure to be unreasonable. See Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The fact that a petitioner is a small business or engaged in sales or services will not preclude the beneficiary from qualifying for classification under section 203(b)(1)(C) of the Act. For this reason, the director's decision will be withdrawn, in part, as it relates to the reasonable needs of the petitioning business.

The director also concluded that the beneficiary's position is more of a first-line manager than one of managerial or executive capacity, as statutorily defined, because the beneficiary's subordinates are neither managerial nor professional employees.

Although counsel asserts on appeal that the beneficiary is a function manager, the description of duties that was provided in response to the petitioner's request for additional evidence indicates that over 40% of the beneficiary's job deals either directly with personnel or with personnel-related issues. Therefore, the beneficiary cannot be exclusively seen as a function manager. However, as the petitioner failed to provide job descriptions and education levels for any of the beneficiary's subordinates, both past and present, the AAO cannot affirmatively conclude that those subordinates are either managerial or professional employees. The fact that three out of four of the subordinates named on the petitioner's organizational chart have managerial titles is not sufficient to determine that these employees are, indeed, managerial or professional as their titles suggest.

Counsel emphasizes the beneficiary's high-ranking position within the petitioner's organizational hierarchy, as well as her discretionary decision-making powers over the day-to-day operations. Neither of these points are disputed. However, counsel must note that the beneficiary's position and authority are only two of a total of four factors that must be considered in determining whether her duties are primarily managerial or executive. The petitioner must also establish that the beneficiary is either supervising managerial or professional employees or, if no employees are supervised, the petitioner must establish that the beneficiary manages or directs an essential function without actually performing that function. In the instant case, a significant portion of the beneficiary's job focuses on personnel and personnel-related issues. However, the petitioner has failed to submit sufficient evidence to

establish that the beneficiary's subordinate staff is either professional or managerial. 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).

Further, in examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). In the instant case, the lengthy description provided of the beneficiary's job duties is too general to convey an understanding of exactly what the beneficiary will be doing on a daily basis. For instance, there is no way to determine what exactly the beneficiary does in carrying out her responsibility for accounts payable and receivable. The description does not reveal whether she directly contacts the vendors and customers or whether subordinate employees perform this function. There is also no clear indication of what the beneficiary does to "oversee" the employees who are designated the task of establishing lines of credit and borrowing capabilities. Nor does the petitioner indicate which of the petitioner's employees are assigned that particular duty. Upon review, the description of the beneficiary's job duties lead the AAO to affirm the director's conclusion that the beneficiary is performing as a professional or "staff officer," not as a manager or executive.

The record contains insufficient evidence to demonstrate that the beneficiary has been and will be employed in a primarily managerial or executive capacity. Further, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel, or that the beneficiary will be relieved from performing non-qualifying duties. The AAO is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.