

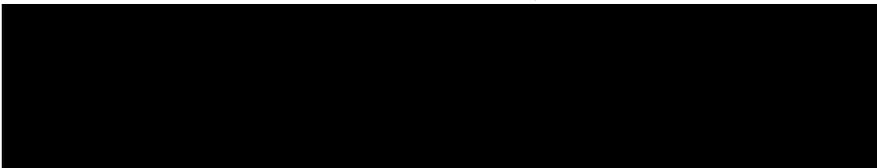


U.S. Department of Homeland Security

Citizenship and Immigration Services

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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



FILE: WAC 01 257 60282 Office: CALIFORNIA SERVICE CENTER Date:

NOV 19 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:



**PUBLIC COPY**

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 the 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 1997 in the State of Hawaii and is claimed to be an affiliate of the [REDACTED] located in Japan. The petitioner is engaged in the business of designing Hawaiian-style apparel and surfboards and exporting them to Japan under the brand names of "Propella" and "P2K." 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 that 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 employed in a managerial or executive capacity.

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 in the United States as follows:

Hire, fire, and promote employees. Plan and prepare work schedules and assign employees to specific duties. Analyze sales statistics to formulate policy and to assist stores to increase business volume. Review market analyses to determine customer needs, volume potential, and price schedules. Establish financial goals and budgets for the business. Conduct market research and develop new market for company products.

On January 30, 2002, the director instructed the petitioner to submit, in part, its organizational chart identifying the beneficiary's position in the company's hierarchy, a more detailed description of the beneficiary's job duties, and a list of the employees under the beneficiary's supervision, their brief job descriptions, educational levels, and the salaries or wages, as well as state quarterly wage reports for all employees for the four quarters in the year 2000.

In response to the above request, the petitioner provided the following description of the beneficiary's current job in her capacity as general manager of the petitioning organization:

[The beneficiary] has been responsible for managing the overall operations of the company. [She] performs two main functions for the company (1) merchandise sales, and (2) administration. She is responsible for negotiating with cloth designers, model agents, and retailers to sign up promotion and distribution agreements to promote the company's brand name "Propella." Supervise and work with designers, pattern makers, and merchandisers to design and promote new trademarks, and to plan and execute marketing plans. Administratively, [the beneficiary] is responsible for overseeing the company's accountant in preparing financial statements, and all necessary tax filings; monitors and authorizes spending to ensure positive cash flows and efficiency of operations. Currently, [the beneficiary] devotes about sixty percent of her time in promoting and marketing the company's brand names, forty percentage [sic] of her time in managing the administrative functions of the company. . . .

The petitioner also submitted two organizational charts, each illustrating the beneficiary's position with respect to her two main functions as merchandiser and administrator. The chart regarding the beneficiary's function as merchandiser indicates that the beneficiary has three subordinates including a design controller, a production controller, and a sales promoter. None of these employees can be classified as managerial or supervisory as they have no subordinates. It must therefore be determined whether the beneficiary's subordinates are professional employees based on the statutory definition of the term "profession."

Section 101(a)(32) of the Act states that the term "profession" includes, but is not limited to architects, engineers, lawyers, physicians, surgeons, and teacher of elementary or secondary schools, colleges, academies, or seminaries. Additionally, as provided in 8 C.F.R. § 204.5(k)(2), the term "profession" includes not only one of the occupations listed in section 101(a)(32) of the Act, but also any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum

requirement for entry into the occupation. In the instant case, two of the beneficiary's subordinates are high school graduates, and the third employee is a graduate of a vocational institution. None of these employees have either a baccalaureate degree or its equivalent. As such, they cannot be considered professionals.

The organizational chart that illustrates the beneficiary's function as an administrator indicates that she manages an accountant.

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

The petitioning entity does not have a reasonable need for an executive because they are a two-employee company and this type of business does not require or have a reasonable need for an executive. It is contrary to common business practice and defies standard business logic for such a company to have an executive . . . .

Although the appeal will be dismissed, it must be noted that the director based her decision, in part, on an improper standard. The director should not hold a petitioner to her undefined and unsupported interpretation 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 § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). Neither the size of the petitioning entity nor the nature of its business should be the sole basis for determining that the petitioner does not qualify for the 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 determined that the beneficiary does not supervise employees that are professional or managerial. Although the petitioner's accountant appears to be a "professional" employee, as discussed above, 60% of the beneficiary's time is spent supervising those employees who are not managerial or professional.

On appeal, counsel emphasizes the beneficiary's discretionary decision-making authority and her overall leadership role in the direction of the company. However, 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 beneficiary's primary duties include working with designers, pattern makers, and merchandisers to design and promote the company's products under various trademarks. The salaries of the design and production controllers, based on the tax documentation submitted, are commensurate with part-time employees. Given that fact, CIS is lead to the conclusion that the beneficiary's role in the merchandising function is not merely a managerial one. Rather, the beneficiary must inevitably be performing many of the duties associated with merchandising. Her performance of such non-managerial duties contradicts the petitioner's claim that the beneficiary is *primarily* performing managerial or executive duties. 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, 604 (Comm. 1988).

Counsel asserts that every organization, whether large or small, requires the services of "an astute executive" in order to become financially successful. However, counsel fails to distinguish between "executive," as that term is defined in the dictionary or by industry standards, and the statutory definition of that term. The latter contains specific provisions that significantly limit a beneficiary's duties and prohibit the beneficiary from actually performing duties that are not directly related to managing a function or directing the management of that function. In the instant case, the petitioner has not established its adherence to the statutory definition of the terms "manager" or "executive." Upon review, the description of the beneficiary's job duties leads CIS to conclude that the beneficiary is performing as a professional or "staff officer," not as a manager or executive.

The director also determined that the petitioner failed to establish that the beneficiary was employed abroad in an executive capacity. On appeal, counsel asserts that the director merely cited the beneficiary's duties abroad without providing an explanation or analysis as to why those duties were determined to be non-qualifying. A thorough review of the

director's decision suggests that counsel's assertion is correct. Consequently, the director's decision as it pertains to the beneficiary's duties abroad is hereby withdrawn.

However, on review, the record contains insufficient evidence to demonstrate that the beneficiary has been and will be employed in a primarily managerial or executive capacity in the United States. The record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel, or that she will be relieved from performing non-qualifying duties. CIS is not compelled to deem the beneficiary to be a manager or executive simply because she 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.