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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B4

[redacted]

DATE: JAN 06 2012 OFFICE: NEBRASKA SERVICE CENTER [redacted]

IN RE: Petitioner:
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)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner was organized as a limited liability company on June 3, 2005 in the State of Delaware. It currently seeks to employ the beneficiary as its president and chief technical officer. 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.

Looking to the statute and the common law definition of employee, the director determined that the petitioner failed to establish that the prospective U.S. employer and the beneficiary have an employer-employee relationship and denied the petition in a decision dated June 8, 2009. The director's conclusion was primarily based on two observations: (1) the beneficiary is a founder of the petitioning entity and is also the inventor of the technology the petitioning entity uses; and (2) the beneficiary is unlikely to be fired by his spouse.

After reviewing the record in its entirety, the AAO finds that while the director's observations are factually correct, they do not warrant the adverse finding that resulted in the denial of the petition. In light of the AAO's determination, the director's decision will be withdrawn.

Notwithstanding the withdrawal of the director's decision, the AAO finds that the record as presently constituted does not establish that the petitioner is eligible for the immigration benefit sought.

First, it is noted that, despite the fact that the petitioner was organized in the State of Delaware, the petitioner stated in a supporting statement dated May 3, 2007 that its headquarters and manufacturing facility are based in the State of Illinois. However, according to the Illinois Department of Corporations records, the petitioner's status in Illinois was revoked on January 8, 2010.[1] The AAO therefore finds that additional evidence is required to establish that the U.S. entity continues to engage in the "the regular, systematic, and continuous provision of goods and/or services" sufficient to show that the petitioner is doing business. 8 C.F.R. § 204.5(j)(3)(i)(D).

Next, the record does not contain adequate documentation to establish that the petitioner has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer, i.e., [redacted] and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

> *Affiliate* means:
>
> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

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[1] *See* http://www.ilsos.gov/corporatellc/CorporateLlcController.

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

* * *

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

According to Exhibit B of the operating agreement, which was executed on May 25, 2005 and was initially submitted in support of the Form I-140, there were originally seven parties with an ownership interest in the petitioning entity with no one party owning a majority interest, i.e., 51% or more. The petitioner also submitted a document titled "Certificate of Operating Agreement and Related Matters for [redacted] which was executed on May 31, 2006 and which indicates that the foreign entity and the beneficiary's spouse each owns 45% of the petitioning entity while [redacted] owns the remaining 10%. While both documents indicate that the beneficiary's foreign employer has a 45% ownership interest in the petitioning entity, they do not establish that the beneficiary's foreign employer and the U.S. petitioner have a parent-subsidiary relationship under the regulatory definition of *subsidiary*. *Id.* Furthermore, the degree of common ownership between the two entities does not rise to the level of an affiliate relationship under subsections A or B of the regulatory definition for *affiliate*. *Id.*

In light of the above, the AAO finds that additional documentation is required in order to establish that the requisite qualifying relationship exists between the petitioner and the beneficiary's employer abroad.

Lastly, in order to establish eligibility, the petitioner must provide evidence to show that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity. Section 203(b)(1)(C) of the Act. The regulation at 8 C.F.R. § 204.5(j)(5) requires the petitioner to 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.

While the AAO acknowledges that no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to his/her proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The statements provided to describe the beneficiary's position with the foreign entity and his proposed position with the U.S. petitioner lack sufficient information about the beneficiary's specific day-to-day duties

to establish that the beneficiary has been and would be employed in a primarily managerial or executive capacity.

While the director's original decision denying the petition must be withdrawn, the record as presently constituted does not establish that the petition merits approval. The director is therefore instructed to issue a request for evidence in an effort to elicit the necessary information and determine whether the petition meets the relevant statutory and regulatory requirements. The director may also request any other evidence that he may deem necessary in order to establish the petitioner's eligibility to classify the beneficiary as a multinational manager or executive.

ORDER: The decision of the director dated June 8, 2009 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion.