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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: NOV 21 2013 OFFICE: TEXAS 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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition. The matter was summarily dismissed by the Administrative Appeals Office (AAO) on appeal. The AAO also dismissed the petitioner's subsequent motion to reconsider. The matter is before the AAO on a second motion to reopen and reconsider the decision. The AAO will grant the motion and reconsider the petitioner's appeal. The matter will be remanded to the service center director for further action and entry of a new decision.

The petitioner is a Georgia corporation engaged in the distribution of consumer goods. The petitioner is seeking to employ the beneficiary as its president/general manager. 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.

On April 12, 2010, the director denied this petition concluding that the beneficiary, as owner of both the foreign and petitioning entity, is the petitioner's proprietor and not an employee subject to the petitioning company's control. Therefore, the director determined that the beneficiary does not qualify as an employee of the petitioner as required for eligibility under this petition.

Although the AAO previously summarily dismissed the petitioner's appeal pursuant to the regulation at 8 C.F.R. § 103.3(a)(1)(v), we will grant the instant motion in order to reconsider the petitioner's claim that the director's decision was based on an erroneous conclusion of law.

I. The Law

Section 203(b) of the Act states in pertinent part (with emphasis added):

> (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 been employed by a firm, corporation or other legal entity, or an

affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a Form I-140 to seek classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). 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. *See* section 101(a)(44) of the Act. Such a statement must clearly describe the duties to be performed by the alien. *Id.*

II. Beneficiary as Employee and Sole Owner

The director denied the petition after concluding that the beneficiary, as the sole owner of the petitioning corporation, may not be considered an employee of the petitioner. The director raised no other grounds for denying the petition.

The director noted that, within the context of immigrant petitions seeking to classify the beneficiary as a multinational manager or executive, a worker that is also a partner, officer, member of a board of directors, or a major shareholder may only be defined as an "employee" if he or she is subject to the organization's "control." Furthermore, the director stated that it had not been established that the beneficiary would be controlled by the petitioner. For example, the director observed that the beneficiary would report to no one, he would set the rules of his work, he could not be fired, and he would share in the losses and profits. As a result, the director found that the petitioner did not establish that the beneficiary would be an "employee" of the petitioner and for that reason the petition could not be approved.

Sections 203(b)(1)(C) and 101(a)(44) of the Act, along with the related regulations at 8 C.F.R. § 204.5(j), all make use of the terms "employed," "employee," and "United States employer." These terms are not defined by statute or the applicable regulations. Accordingly, the AAO must view how these terms are used in the statute and, considering the specific context in which that language is used, examine whether the terms are outcome determinative.

Statutory interpretation begins with the language of the statute itself. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). The AAO must "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). The "inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" *Robinson*, 519 U.S. at 340; *see also United States v. Abuagla*, 336 F.3d 277, 278 (4th Cir. 2003).

While the statute uses the term "employee" in the definition of manager or executive, the AAO notes that the key elements of the statutory definitions focus on the duties and responsibilities of the employee and not the person's employment status. Looking at the statutory scheme as a whole, the

AAO concludes that it is most appropriate to review the beneficiary's eligibility by making a determination on his or her claimed managerial or executive employment.

The AAO recognizes that there is some tension between the terms "employee" and "executive." In *Matter of Aphrodite Investments Ltd.*, the INS Commissioner expressed concern that adopting the word "employee" would exclude "some of the very people that the statute intends to benefit: executives." 17 I&N Dec. 530, 531 (Comm'r 1980); *but see Clackamas Gastroenterology Assoc., P.C. v. Wells*, 538 U.S. 440, 448-49 (2003) (examining whether a director-shareholder is an employee under the common-law touchstone of "control"). This tension would generally lead the AAO to carefully consider the statutory definitions in their entirety, including the four critical subparagraphs of each definition. *See* sec. 101(a)(44)(A) and (B) of the Act. If USCIS were to focus solely on an employer-employee analysis, without considering the constituent elements of the definitions, the inquiry would be incomplete under the statute.[1]

In the present matter, the director's use of the employer-employee issue appears to be an attempt to address the marginality of the petitioning business or the use of the corporate form as a shell for immigration purposes. While not irrelevant, the employer-employee issue is not the optimal means of addressing these concerns. Instead, the director should focus on the fundamental eligibility requirements. Marginality and the validity of the job offer are best addressed by the regulation that requires the petitioner to establish its ability to pay. *See* 8 C.F.R. § 204.5(g)(2); *see also Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm'r 1977) (noting that the fundamental focus of ability to pay is whether the employer is making a "realistic" or credible job offer).

Upon review, the beneficiary's employer-employee relationship with the foreign entity is not the essential issue for consideration when evaluating the petitioner's eligibility. The decision of the director will be withdrawn as it relates to the beneficiary's status as an employee. The AAO finds no need to further explore the issue of an employer-employee relationship between the beneficiary and its foreign and U.S. employers.

III. Additional Issues

The AAO reviews each appeal on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Although the director's sole ground for denial will be withdrawn, the petition cannot be approved as there is insufficient evidence that the petitioner has met all requirements for the requested immigrant classification. Accordingly, the matter will be remanded to the service center director for additional review and entry of a new decision.

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[1] The one area where the employment status of the beneficiary may be critical is the enabling statute at section 203(b)(1)(C) of the Act, which requires that the beneficiary has been "employed for at least one year" by a qualifying entity abroad. In this regard, based on the plain language of the statute, the beneficiary must be an employee of the foreign entity and not a contractor or consultant.

First, the petitioner failed to provide sufficient evidence to establish that the beneficiary had been employed abroad or would be employed in the United States in a qualifying managerial or executive capacity consistent with the definitions at sections 101(a)(44)(A) and (B) of the Act. In reviewing the petitioner's documentation submitted in support of the petition and in response to the director's request for evidence (RFE), the petitioner has not provided evidence of the foreign entity's staffing and organizational structure corresponding with the beneficiary's period of employment abroad. Further, the petitioner provided inconsistent information regarding its own staffing levels and the duties performed by subordinate employees. It failed to provide payroll documents corresponding to the date of filing, evidence which would assist in resolving these inconsistencies.

Moreover the information provided by the petitioner describing the beneficiary's proposed duties and duties abroad was vague and failed to provide adequate information regarding the beneficiary's specific tasks. Therefore, it is unclear how much time the beneficiary had allocated or would allocate to tasks within a qualifying capacity and how much of his time he would or had allocated to performing daily operational tasks. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act.

While the AAO acknowledges that no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the 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). Therefore, in order to establish eligibility, it is imperative that the petitioner establish that the beneficiary would primarily perform tasks of a qualifying nature.

Finally, regarding the beneficiary's employment abroad, the petitioner failed to provide any evidence to establish that the beneficiary was employed by the foreign employer in a managerial or executive capacity for at least one full year in the three years preceding her admission to the United States. 8 C.F.R. § 204.5(j)(3)(i)(B).

Second, the AAO finds that the record lacks sufficient evidence to establish that the petitioner and the beneficiary's foreign employer have a qualifying relationship. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer 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 petitioner claims that the beneficiary is the sole owner of the petitioning company and submitted evidence in support of that claim. Nevertheless, the petitioner also claims that the

petitioning company has a qualifying relationship with the foreign entity as its subsidiary. The petitioner did not submit sufficient documentation to establish a parent-subsidiary relationship. Further, the petitioner has not resolved these competing and inconsistent claims regarding the qualifying relationship. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Accordingly, the matter will be remanded for review and a new decision. The director may issue a notice requesting any additional evidence he deems necessary in order to determine the petitioner's eligibility for the benefit sought.

ORDER: The director's April 12, 2010 decision, and the AAO's decisions dated April 11, 2012 and February 4, 2013 are withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision, which, if adverse, shall be certified to the AAO for review.