

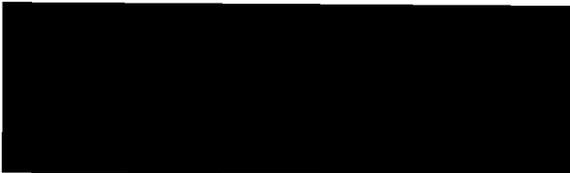
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
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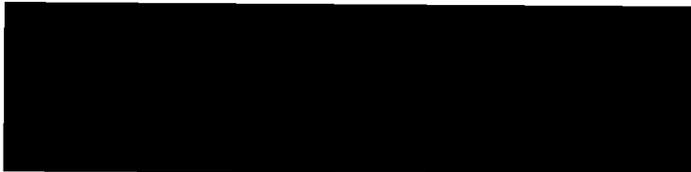
OFFICE: TEXAS SERVICE CENTER

Date: **AUG 03 2010**

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)

ON BEHALF OF PETITIONER:



**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 \$585. 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, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal.<sup>1</sup> The matter will be remanded back to the director for full consideration of the petitioner's eligibility for the immigration benefit sought.

The petitioner is a corporate entity that seeks to employ the beneficiary as its plant 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. The director denied the petition based on the finding that the beneficiary's prior adjustment of status to that of a lawful permanent resident and the subsequent allocation of an immigrant visa as a result of such adjustment relieves U.S. Citizenship and Immigration Service (USCIS) from having to determine whether the beneficiary merits an immigrant visa on the basis of an approved Form I-140 petition.

On appeal, counsel disputes the director's decision to deny the petitioner the opportunity to petition for an I-140 immigrant visa on behalf of the beneficiary. In an appeal support letter dated June 26, 2009, counsel acknowledges that the beneficiary would not be eligible to apply for an adjustment of status in the United States and further explains that the beneficiary would instead apply for an immigrant visa at a U.S. Embassy abroad where he would also abandon his current lawful permanent resident status. In reviewing the petitioner's record of proceeding the AAO finds that counsel's arguments are persuasive.

First, the AAO notes that there is no statutory or regulatory provision that sets guidelines for the filing of an employment-based immigrant petition on behalf of an alien who has already been accorded the status of an alien lawfully admitted for permanent resident status. Second, the AAO acknowledges that an alien may utilize an approved visa petition to attain the status of a lawful permanent resident either by: (1) filing a application in the United States to adjust status to that of a permanent resident pursuant to the provisions of section 245 of the Act or (2) making a lawful entry with an immigrant visa that was issued at a U.S. Consulate abroad. While a lawfully admitted permanent resident is barred from adjusting status in the United States, there is nothing in the Act that would prohibit a lawful permanent resident from abandoning his or her permanent residence upon departure and then applying for an immigrant visa abroad on the basis of a newly approved immigrant visa petition. *See* USCIS Adj. Field Manual 23.2(c)(1)(B) (noting that permanent residents are barred from adjusting status); *see also* INS General Counsel Opinion 89-90, "Eligibility of Lawful Permanent Residents for Adjustment of Status" (Dec. 21, 1989).

Accordingly, because the beneficiary has expressed an intent to abandon his permanent residence upon departure and also requested consular notification instead of adjustment of status, the petitioner's eligibility to classify the beneficiary as an employment-based immigrant pursuant to

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<sup>1</sup> The record shows that the director erroneously informed the petitioner that only a motion could be filed to seek review of the denial and that the petitioner did not have the right to appeal. That instruction was erroneous and the petitioner's appeal has since been forwarded to the AAO where the matter will be accorded a comprehensive review.

section 203(b)(1)(C) of the Act must be fully examined on the basis of all relevant factors cited in 8 C.F.R. § 204.5(j).

That being said, the AAO's determination in this matter addresses only the petitioner's eligibility to file an employment-based immigrant petition, not the petitioner's eligibility for the underlying immigration benefit that would result from an approved visa petition. While the record shows that the petitioner's previously filed Form I-140 on behalf of the same beneficiary was approved, the petitioner's eligibility, even when filing a petition seeking the same immigration benefit as sought in the filing of the prior petition, must stand on its own individual merits and be able to meet the relevant statutory and regulatory requirements.

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 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.

The provisions of 8 C.F.R. § 204.5(j)(3)(i) require that a petition for a multinational executive or manager be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

(A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

(B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the

alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;

(C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and

(D) The prospective United States employer has been doing business for at least one year.

Additionally, 8 C.F.R. § 204.5(j)(5) requires the petitioner to provide an offer of employment, which must clearly describe the job duties the beneficiary would perform in his proposed position with the U.S. entity.

In view of the requirements described above and pursuant to a preliminary review of the record in light of the relevant eligibility requirements, the AAO finds that the record as presently constituted does not warrant approval of the immigrant visa petition filed in the instant matter.

In particular, the AAO notes deficiencies in the petitioner's description of the beneficiary's proposed employment and his employment with the foreign entity. In determining whether the petitioner has satisfied the requirements cited in 8 C.F.R. §§ 204.5(j)(3)(i)(B) and 8 C.F.R. § 204.5(j)(5), it is important to note that 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 AAO further notes that the petitioner must provide a job description that conveys a meaningful understanding of what the beneficiary primarily did and will do on a daily basis, as the actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In the present matter, while the petitioner adequately conveys the beneficiary's discretionary authority with regard to the employees he currently manages, the record lacks a description of the specific tasks that the beneficiary currently performs. Furthermore, the definition of managerial capacity states that 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)(A)(iv) of the Act. The record in the present matter lacks sufficient information about the beneficiary's direct subordinates to allow the AAO to conclude that the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees, or, if the petitioner does not primarily manage personnel, that he manages an essential function within the organization, or a department or subdivision of the organization. Section 101(a)(44)(A)(ii) of the Act. The same is true of the beneficiary's employment abroad as senior purchaser, where the beneficiary was described as having managed three purchasers. The petitioner

did not provide sufficient evidence to establish that the beneficiary's subordinates abroad were supervisory, professional, or managerial employees, or, in the alternate, that the beneficiary spent the primary portion of his time managing an essential function. *Id.*

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)). Thus, merely stating that the beneficiary's subordinates are/were managerial and professional employees is not sufficient without supplemental information, including the subordinates' position descriptions and educational levels.

Additionally, given the petitioner's intention to abandon his U.S. residence and pursue permanent resident status under the more recently filed Form I-140, the issue of the beneficiary's employment abroad would have to be reassessed. Specifically, as the beneficiary would no longer be in the United States after he departs for the purpose of abandoning his permanent U.S. residence, his one year of employment abroad would be based on the three-year period that directly preceded the filing of the petition. See 8 C.F.R. § 204.5(j)(3)(i)(A). However, the record indicates that the beneficiary was in the United States working for the petitioner during that relevant three-year period. Therefore, the director should request that the petitioner explain how the beneficiary fits the criteria of 8 C.F.R. § 204.5(j)(3)(i)(A), which requires the beneficiary to have been employed abroad for one out of three years prior to the filing of the instant Form I-140.

In light of the above, the AAO cannot readily conclude that the petitioner is eligible for the immigration benefit sought. It is clear that further evidence and information is required in order to render a favorable determination.

Accordingly, the AAO hereby remands this matter back to the director for the express purpose of having the director issue a request for evidence addressing the deficiencies described above. Once the petitioner has had ample opportunity to supplement the record with the required evidence and information, the director shall then make a determination with regard to the petitioner's eligibility for the employment-based immigrant visa sought in the present matter. The director may also request any additional evidence he deems necessary in order to determine the petitioner's eligibility for the benefit sought.

**ORDER:** The decision of the director dated June 1, 2009 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision. If the new decision is adverse to the petitioner, the decision shall be certified to the AAO for review.