

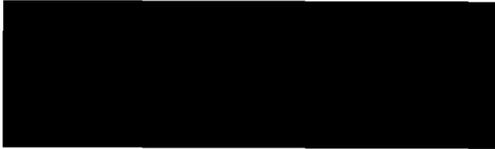
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



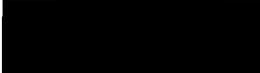
**U.S. Citizenship
and Immigration
Services**



B4

DATE: **APR 19 2012**

Office: NEBRASKA SERVICE CENTER

File: 

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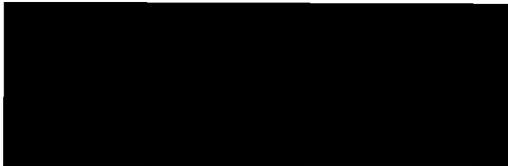
Petitioner:

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:

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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DISCUSSION: The Director, Nebraska Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision and remand the petition to the director for further review and entry of a new decision.

The petitioner is a corporation organized in the State of Florida that claims to be engaged in the wholesale of luxury watches. It claims to be an affiliate of the beneficiary's overseas employer, [REDACTED] a sole proprietorship located in [REDACTED]. The petitioner seeks to employ the beneficiary as its president and chief executive 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.

The director denied the petition on the grounds that the petitioner failed to establish that the beneficiary had an employer-employee relationship with the foreign entity or that he would have an employer-employee relationship with the United States petitioner. On appeal, counsel for the petitioner disputes the denial and submits a brief addressing the director's findings and further evidence in support of the petitioner's claims.

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.*

(Emphasis added.)

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. *See* 8 C.F.R. § 204.5(j)(5).

Upon review of the record, the director's denial of the petition is solely based on the lack of an employer-employee relationship between the beneficiary and the foreign and U.S. entities. The AAO will withdraw the director's decision.

The AAO notes that the words "employee" and "employ" are complex and nuanced legal terms. While the words "employee" and "employ" are an important component to the statutory definition, an immigration officer should not fixate on these words to the exclusion of other more relevant terms, such as "managerial" and "executive." In evaluating a beneficiary's employment in accordance with section 203(b)(1)(C) of the Act, the focus is whether the beneficiary has been and will be primarily serving in a managerial or executive capacity. *See also* 8 C.F.R. § 204.5(j)(5).

Although the AAO will withdraw the director's determination, the AAO finds that the record, as it presently stands, does not warrant approval of the petition. The evidence provided is insufficient to establish: (1) that the beneficiary would be employed by the U.S. petitioner in a managerial or executive capacity; or (2) that there is currently a qualifying relationship between the beneficiary's foreign employer and the U.S. petitioner. The director did not address either of these critical issues in the ultimate decision.

With respect to the issue of whether the beneficiary would be employed in the U.S. 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.

The AAO finds that the evidence of record presents an incomplete and at times contradictory picture of the staffing of the U.S. company and the beneficiary's role and responsibilities within the company. For example, the petitioner's stated number of employees varies from 8 on the Form I-140, to 7 in a supplementary description attached to the Form I-140, to 5 in the petitioner's tax documentation for the year 2006, payroll record for January 2007, and response to the director's request for further evidence (RFE). The position titles of the petitioner's employees also vary in different sections of the attachment to the Form I-140 and the response to the RFE. Although the petitioner submitted an organizational chart, it combines the staff of both the petitioner and its U.S. affiliate and thus fails to reflect the true organizational structure of the U.S. petitioner itself.

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 petitioner purports that the beneficiary is carrying out managerial and executive job duties, without accurate and sufficiently detailed disclosure regarding the U.S. petitioner's staff, it cannot be determined whether the beneficiary has sufficient staffing to relieve him from performing operational, non-qualifying tasks within the company. 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 Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Further, the petitioner has not explained or accounted for any of the above-referenced discrepancies in the record with respect to its staff. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to

a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Additionally, although the petitioner asserts that the beneficiary is managing a subordinate staff, the record, with its inconsistencies, does not establish that the beneficiary's subordinate staff is composed of supervisory, professional, or managerial employees. See section 101(a)(44)(A)(ii) of the Act. Although some of the beneficiary's subordinates hold managerial titles, it is not clear based on the record that such employees in fact supervise other employees and are not managers in name only. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. If the beneficiary is primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

In light of the evidentiary deficiencies described above, the current record is insufficient to support the conclusion that the beneficiary would be employed by the U.S. petitioner in a managerial or executive capacity.

Further, in order to establish eligibility for classification as a multinational manager or executive for immigrant visa purposes, the petitioner must establish that it maintains a qualifying relationship with the beneficiary's foreign employer; the foreign corporation or other legal entity that employed the beneficiary must continue to exist and have a qualifying relationship with the petitioner at the time the immigrant petition is filed. 8 C.F.R. §204.5(j)(3)(i)(C). A multinational executive or manager is one 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." Section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C).

In this instance, the petitioner claims that the U.S. company and the beneficiary's foreign employer are affiliates since both entities are wholly owned by the beneficiary. However, it is noted that the foreign entity is a sole proprietorship. Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984). A sole proprietorship is a business in which one person owns all of the assets and operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Edition). As the beneficiary claims to be the owner and sole proprietor of the foreign business, the presence of the beneficiary in the United States raises the question of whether the foreign business continues to do business abroad in his absence. The petitioner has not submitted any evidence to establish that the foreign sole proprietorship continues to do business, as required by the regulation at 8 C.F.R. § 204.5(j)(2).

Without evidence to demonstrate that the foreign sole proprietorship continues to exist and do business even as the beneficiary, the sole proprietor, is permanently transferred to the U.S. company under the present petition, it cannot be concluded that a qualifying relationship *continues* to exist between the U.S. and foreign entities.

In light of the foregoing, the AAO finds the evidence of record insufficient to warrant approval of the petition. Further evidence is required in order to establish that the petitioner and beneficiary meet the requirements for

the requested immigrant visa classification, specifically, evidence establishing that the beneficiary would be employed in the United States in a managerial or executive capacity and that the foreign entity continues to be doing business, such that it continues to have a qualifying relationship with the U.S. petitioner.

The director's decision will be withdrawn and the matter remanded for further consideration and entry of a new decision. The director is instructed to issue a request for evidence addressing the issues discussed above, and any other evidence he deems necessary.

ORDER: The decision of the director dated July 21, 2008 is 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.