



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: **AUG 21 2013**

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

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: SELF-REPRESENTED

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 preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision and remand the matter for further action.

The petitioner is a California limited liability company that operates as a movie production and distribution enterprise. At the time of filing, the petitioner had accumulated over \$250,000 in paid invoices for products and/or services provided. The petitioner seeks to employ the beneficiary as its chief executive officer/manager. The petitioner endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition based on the following two adverse findings: (1) the petitioner failed to establish that it had been doing business for one year prior to filing the petition; and (2) the petitioner does not have an employer-employee relationship with the U.S. petitioner because he is ultimately the majority owner of the company.

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.*

The regulation at 8 C.F.R. § 204.5(j)(3)(i) lists the initial evidence that the petitioner is required to submit in support of the Form I-140. Relevant to the matter at hand is the requirement discussed at 8 C.F.R. § 204.5(j)(3)(i)(D), which requires the petitioner to establish that it has been doing business for at least one year prior to filing the Form I-140. The term "doing business" is defined as the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office. 8 C.F.R. § 204.5(j)(2)

With respect to managerial and executive capacity, section 101(a)(44) of the Act defines the terms as follows:

(A) 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.

(B) 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.

8 U.S.C. § 1101(a)(44) (emphasis added).

II. Beneficiary as Employee and Majority Owner

The director denied the petition after concluding that the beneficiary, as the majority owner of the petitioning corporation, may not be considered an employee of that entity. The director raised this issue as one of two grounds for denying the petition.

The director noted that USCIS regulations provide that only a "United States employer" may file a visa petition on the beneficiary's behalf. 8 C.F.R. § 204.5(j)(1). Furthermore, the director observed that two binding precedent decisions clarify that a beneficiary's ownership of the petitioning corporation is irrelevant to the beneficiary's eligibility, as a corporation is a separate legal entity apart from its shareholders. *See Matter of Aphrodite Investments Ltd*, 17 I&N Dec. 530 (Comm'r 1980); *Matter of Allen Gee*, 17 I&N Dec 296 (Act. Reg. Comm'r 1979). However, the director noted that the U.S. Department of Labor (DOL) regulations at 20 C.F.R. § 656.3 define employment as "full-time work by an employee for an employer other than oneself." The director concluded that there is a "conflict of laws" and proposed that the case must be resolved by "adhering to the primary authority that addresses the issue in greatest detail," specifically the DOL regulations.

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 beneficiary 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 petitioning entity is not the essential issue for consideration when evaluating the petitioner's eligibility. 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. Doing Business

As indicated above, the director's denial was based, in part, on the determination that the petitioner failed to establish that it had been doing business for one year prior to filing the instant petition. The record shows that the petition was filed on July 27, 2012.

Despite the director's conclusion, the record contains sales invoices and corroborating bank statements, which show that the petitioner issued invoices and was compensated the amounts shown in those invoices commencing with an invoice that was issued on August 1, 2011. The record shows similar invoices issued by the petitioner to various customers throughout the remainder of 2011 and continuing through July 1, 2012, the date of the latest invoice. In light of the various supporting documents, the AAO finds that the petitioner has provided sufficient evidence to meet the filing requirement discussed at 8 C.F.R. § 204.5(j)(3)(i)(D).

Accordingly, the decision of the director will be withdrawn as it relates to the beneficiary's status as an employee and the filing requirement at 8 C.F.R. § 204.5(j)(3)(i)(D).

IV. Employment in a Managerial or Executive Capacity

Despite withdrawing the director's original basis for denial, the AAO notes that the record nevertheless reveals at least one other possible ground for ineligibility and the petition cannot be approved based on the record as presently constituted.

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.

Upon review, the petitioner has failed to present sufficient evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. In reviewing the petitioner's organizational chart and the beneficiary's U.S. job description, the evidence of record shows that the petitioner's organizational structure and staffing at the time of filing were extremely limited. Thus, it is unclear who would relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying operational tasks.

Although the AAO has reviewed the job descriptions offered for the proposed position, the provided information is overly vague and fails to describe the beneficiary's job duties with adequate specificity. The petitioner has not established how much time the beneficiary would allocate to tasks within a qualifying capacity and how much of his time he would allocate to the petitioner's daily operational tasks.

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.

V. Conclusion

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 decision of the director dated April 2, 2013 is hereby 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.