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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

Date: **JUN 05 2013** OFFICE: TEXAS 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)

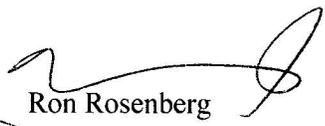
ON BEHALF OF PETITIONER:

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,


Ron Rosenberg
Acting 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 certification. The AAO will withdraw the decision of the director and remand the matter for further action.

The petitioner is a Florida corporation that operates a shipping and freight business. At the time of filing, the petitioner employed a staff of twelve persons and reported a gross annual income of \$2 million. The petitioner seeks to employ the beneficiary as its president. The beneficiary is the sole owner of the U.S. petitioner. He also owns 75 percent of the outstanding shares of the foreign affiliate, where he was employed as managing director for five years prior to entering the United States as an E-2 nonimmigrant treaty investor. The petitioner now 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).

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.*

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 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 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 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

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.

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. Beyond the Decision of the Director

Despite withdrawing the director's original basis for denial, the AAO notes that the record nevertheless reveals other possible grounds for denial.

First, the AAO finds that 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 charts—one submitted originally in support of the petition and the other submitted subsequently in response to the director's request for evidence (RFE)—the record is uncertain as to whom the petitioner actually employed and which positions were filled at the time of filing. While the RFE response contains an organizational chart which includes an operations manager, the same is not true of the organizational chart that was originally submitted in support of the Form I-140. It is therefore unclear who was performing the job duties assigned to the operations manager at the time of filing when the petitioner does not appear to have employed anyone in that position.

Although the AAO has reviewed the job descriptions offered for the proposed position, the provided information is overly vague and fails to describe job duties with adequate specificity. It is therefore unclear 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.

Second, the AAO finds that the record lacks sufficient evidence to establish that the petitioner and the beneficiary's employer abroad 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").

In the present matter, while the petitioner claims that the beneficiary is majority owner of the U.S. and foreign employers, thus resulting in an affiliate relationship. However, the only evidence on record pertaining to the foreign entity's ownership is a March 5, 2009 statement signed by the beneficiary himself claiming to own 75% of the shares of [REDACTED] the beneficiary's foreign employer. 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)).

IV. 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 May 10, 2011 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.