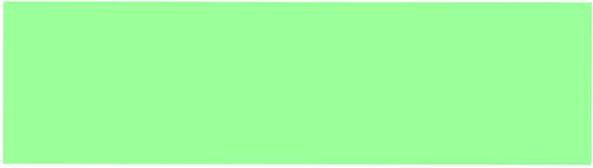


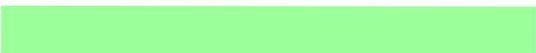
(b)(6)



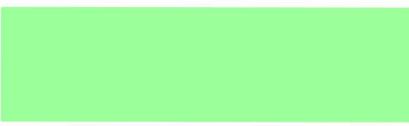
U.S. Citizenship  
and Immigration  
Services



DATE: **JUN 06 2013** OFFICE: TEXAS SERVICE CENTER FILE: 

IN RE: 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas 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, a Florida full service convenience store/gas station, seeks to employ the beneficiary as its president. 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 and U.S. entities. 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.

The language of the statute is specific in limiting this provision to only those executives or managers who have previously worked for a 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 which 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.

Upon review of the record, the director's denial of the petition is solely focused on whether or not the beneficiary was an employee of the foreign entity. The AAO will withdraw the director's decision.

Although section 101(a)(44) of the Act and the related regulations make use of the terms "employee" and "employer," these terms are not defined either by statute or regulation. As mentioned by the director, the Supreme Court expects USCIS to use common law definitions when certain terms, such as "employee" and "employer," are not expressly defined by Congress via statutory provisions. See *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323-324 (1992) (hereinafter "*Darden*"); see also *Restatement (Second) of Agency* § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*").

However, as a preliminary step, it is critical to first review how these terms are used in the statute and then to determine whether the terms are outcome determinative in matters concerning the petitioner's eligibility.

While the statute uses the term "employee" in the definition of manager or executive, the AAO notes that the key elements of the definitions focus on the duties of the employee and not the person's employment status. See sec. 101(a)(44)(A) and (B) of the Act. The AAO concludes, therefore, that it is most appropriate to examine the beneficiary's eligibility in the context of his or her claimed managerial or executive duties, looking at the statutory definition as a whole.<sup>1</sup>

Here, 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 forum 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 is best addressed by the regulation that requires the petitioner to establish its ability to pay. See 8 C.F.R. § 204.5(g)(2). The functions of the beneficiary as a manager or executive, however, are best viewed through the prism of the definitions of managerial and/or executive capacity at sections 101(a)(44)(A) and (B) of the Act.

The one area where the status of the beneficiary as an employee 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, the beneficiary must be an actual employee of the foreign entity and not a contractor or consultant.

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<sup>1</sup> 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*, 538 U.S. at 440. This tension would lead the AAO to carefully consider the statutory definitions in their entirety, including the four critical subparagraphs of each definition. If USCIS were to focus solely on an employer-employee analysis, without considering the constituent elements of the statutory definitions, the inquiry would be incomplete and could lead to the denial of legitimate executives.

In the present case, the record does not indicate that the beneficiary worked in the capacity of either a contractor or a consultant during his period of employment abroad. Therefore, the beneficiary's employer-employee relationship with the foreign entity is not paramount to matters concerning the petitioner's eligibility. As the record indicates that the beneficiary was working directly for the foreign entity and now works directly for the petitioning entity, the decision of the director will be withdrawn as it relates to the beneficiary's status as an employee.

Although the AAO will withdraw the director's determination and sole basis for denial of the petition, the AAO finds that the record, as it presently stands, does not warrant approval of the petition. The AAO reviews each appeal on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review, 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.

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).

With respect to the issue of whether the beneficiary would be employed in the United States in a managerial or executive capacity, section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

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.

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 inconsistent picture as to the nature of the U.S. company, its staffing, and the beneficiary's role and responsibilities within the company. For example, while the petitioner claimed seven employees on the Form I-140, two additional documents dated June 25, 2010, reflected that the petitioner employed two individuals, and tax documentation for the petitioner's first quarter of 2010 reflected a single employee.

The petitioner also explained that based on two separate management agreements, one entered into between the petitioner and [REDACTED] and the other agreement entered into between [REDACTED] and [REDACTED] additional staff could be counted among the petitioner's employees. In accordance with the agreements, [REDACTED] would manage the [REDACTED] gas station apparently owned by [REDACTED] in the capacity of an independent contractor. However, according to a "Sub-Management Independent Contractor Agreement," [REDACTED] subcontracted its management agreement to the petitioner resulting in the petitioner's management of the [REDACTED] gas station. Notwithstanding these agreements, this arrangement was neither clearly explained nor sufficiently documented, and the petitioner's claims that the employees of other entities should be counted among its staff are not adequately supported in the record. Nevertheless, the petitioner claims that the [REDACTED] has two employees and [REDACTED] has four employees, and the petitioner includes all of these workers as employees of the petitioning company.

The petitioner submitted an organizational chart which depicted the beneficiary in the Chief Executive Officer/President position and a subordinate general manager who appeared to be responsible for either two separate legal entities or two business locations, [REDACTED] and [REDACTED]. Furthermore, the petitioner asserted that there are two locations to be managed but maintains the employment of only seven individuals, one general manager and one first line manager and two clerk/cashiers at each of the two locations. Regardless, the petitioner failed to provide any evidence to establish that these individuals were actually employed by the petitioner at the time the petition was filed. As noted above, the submitted management agreements alone provide insufficient evidence to establish that the employees of [REDACTED] and [REDACTED] would be under the petitioner's and beneficiary's control. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

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 and omissions 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.

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).

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm'r 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

The petitioner claims that the beneficiary's Indian sole proprietorship, [REDACTED], acquired a 51% interest in the petitioning company in June 2010. If the petitioner submitted sufficient evidence in support of this claim, the two entities would be considered affiliates based on common ownership by the beneficiary. However, the petitioner's evidence of this qualifying relationship is incomplete and contains unexplained inconsistencies.

For example, a single stock certificate identified as stock certificate number 2 was submitted reflecting 510 shares issued, or a majority of shares, to the foreign sole proprietorship in June 2010. However, the petitioner failed to provide copies of all stock certificates issued by the company since its establishment in 1993 or a complete stock ledger to account for all stock transactions. The evidence presented suggest an initial issuance of 500 shares of the petitioner's 1,000 shares of authorized stock to one individual, [REDACTED] at the time the company was incorporated. The record also contains the petitioner's Internal Revenue Service (IRS) Form 1120S, Income Tax Return for an S Corporation for tax year 2008, which indicates that, at that time, the company had three shareholders: [REDACTED] (33%); [REDACTED] (33%); and [REDACTED] (34%). Based on this evidence, it is reasonable to conclude that the petitioner had issued at least four stock certificates prior to the foreign entity's claimed acquisition of 51% of its shares. The petitioner has not explained why the stock certificate issued to [REDACTED] was "number 2" given the number of prior stock transactions.

The petitioner's "stock ledger" only includes the company's claimed current ownership and does not reflect stock transaction dating back to the company's incorporation. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage of ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra.* Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

Further, the petitioner has failed to submit any evidence that the foreign entity or the beneficiary actually paid for the transfer of shares from the petitioner's existing shareholders. Both of the submitted stock purchase agreements required the foreign entity to pay \$25,000 at the time of the purchase and transfer, but there is no evidence that these funds were provided to the sellers.

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 evidence that petitioner and the foreign entity have a qualifying relationship.

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 August 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.