



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 12 2013

OFFICE: TEXAS SERVICE CENTER

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,

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 appeal. The appeal will be sustained.

The petitioner is a Florida corporation that seeks to employ the beneficiary as President/CEO. As part of a global organization, the petitioner and its related enterprises are engaged in providing internet services. Accordingly, 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).

On February 28, 2012, the director denied the petition concluding that the petitioner failed to establish that the beneficiary's employment abroad was within a qualifying managerial or executive capacity. Additionally, relying on the common law definition of the term "employee," the director determined that the petitioner failed to establish that the beneficiary was an employee of the foreign entity and that he would be an employee of the U.S. petitioner.

The AAO will withdraw the director's decision and sustain the appeal. Upon review of the record, the petitioner provided a detailed job description of the job duties performed by the beneficiary with the foreign company; the petitioner also provided paystubs as evidence that the foreign company employed the beneficiary for over a year; and the petitioner provided an organizational chart indicating the subordinates supervised by the beneficiary abroad. The petitioner submitted sufficient evidence to establish eligibility for this immigrant classification.

The AAO will now address the remaining ground for denial, which focused on whether or not the beneficiary was an employee of the foreign entity and whether he would serve as an employee of the U.S. petitioner.

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 U.S. Supreme Court expects agencies 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*").

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. Statutory interpretation begins with the language of the statute itself. *Penn. Dept. of Public Welfare v. Davenport*, 495 U.S. 552 (1990).

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.¹

¹ 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"

Here, the director's use of the employer-employee issue appears to be an attempt to address the marginality of a 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, as in the present case, 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 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.

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. 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.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.

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.