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

(b)(6)

U.S. Citizenship and Immigration Services

Date: JUN 2 5 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.

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 appeal. The AAO will dismiss the appeal.

The petitioner seeks 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 petitioner, a Florida corporation established in 1994, operates a child care and development center under the name Supreme Child Care and Development Center. It is an affiliate of the beneficiary's foreign employer, (the foreign entity), located in Venezuela. The petitioner seeks to employ the beneficiary as its Director Day Care and Preschool Development Center.

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):
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> * * *
>
> > (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. Analysis

The primary issue to be addressed is whether the petitioner established that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity.

The petitioner filed Form I-140, Immigrant Petition for Alien Worker, on August 26, 2008. On Form I-140, the petitioner indicated that the beneficiary will be employed as its Director Day Care and Preschool Development Center. The petitioner described the beneficiary's proposed duties as: "Plan, direct, and coordinate the academic and nonacademic activities and programs of preschool and child care center.

Formulate corporation's goals and objectives. Select, hire, supervise professional and nonprofessional employees." The petitioner claimed to employ a staff of thirteen persons and reported a gross annual income of $364,336. In a letter accompanying the initial petition, the petitioner asserted that it needs the beneficiary's "managerial services."

In support of the petition, the petitioner submitted, *inter alia,* the following:

1. IRS Form 941, Employer's QUARTERLY Federal Tax Return, for the first quarter of 2008 (ending in March), confirming the petitioner's employment of thirteen persons;
2. The petitioner's 2007 Forms W-2, Wage and Tax Statements; and
3. The petitioner's 2007 U.S. organizational chart, depicting the Board of Directors at the top, followed below by the General Manager, the Director, and a Director Assistant. The Director Assistant is depicted as directly overseeing an Infant Lead Teacher, a Toddler Lead Teacher who oversees a Toddler Teacher Assistant, a Two's Lead Teacher, a Three's Lead Teacher who oversees a Three's Teacher Assistant, a Preschool Lead Teacher who oversees a Preschool Teacher Assistant, and a Cook. All positions were unnamed.

The director issued a Notice of Intent to Deny (NOID), advising the petitioner that the evidence in the record was deficient to establish eligibility as a multinational executive or manager. The director instructed the petitioner to submit additional evidence to support the petition, including the following: a statement detailing the duties of the beneficiary in the United States and the percentage of his time spent on the performance on each of his duties; information regarding the U.S. entity's staffing level; an organizational chart that shows position titles and duties of all employees; and evidence of any contract employees.

In response to the NOID, the petitioner submitted, *inter alia,* an affidavit from the beneficiary describing his duties as Director and President of the U.S. petitioning entity as "essentially the same duties of the principal executive officer of a business organization described in Section 092.167-010 (Exhibit A) and 189.117-026 (Exhibit B) of the United States Department of Labor's *Dictionary of Occupational Titles.*" The beneficiary listed his job duties in the United States as the following:

1. Establish the goals, objectives, and policies for the day care facility and the preschool education facility (10%);
2. Formulating and developing plans and strategies in order to achieve the short term and long term goals and objectives of the business organization, and to assure continued funding as a licenses day care facility and authorized preschool education center (10%);
3. Hiring and supervising the position of Principal or Supervisor of Education for the preschool facility in accordance with Florida Department of Education's authorization and standards, reviewing and approving the hiring of lead teachers, kindergarten teachers and teachers' assistants to staff the preschool education facility, and reviewing and approving the hiring of nursery, toddler, playroom, sanitation and nutrition attendants for the day care facility (5%);
4. Coordinate daily, weekly and monthly programs with the Supervisor of Education to assure that the governmentally mandated criteria and requirements are being achieved (5%);
5. Work with the Supervisor of Education and the Supervisor of Nursery, Toddler, Playroom, Playground, Health and Nutrition Care to develop annual plans in accordance with the

organization's proposed budget, and that will satisfy the essential requirements of a licensed day care and preschool education facility, as well as the expectations of the customers or children's parents (10%);

6. Analyze, adjust, and approve the budgets which the Director has outlined for each segment of the business organization including maintaining, repairing and improving the property, classrooms, cooking and nutrition, sanitation, transportation, and recreational activities and structures (5%);
7. Review the employee payroll and authorize the payment of wages and employee expense allowances (5%);
8. Evaluate the effectiveness of the Supervisor of Education, analyze preschool education reports of the performance of each lead teacher, kindergarten teacher, and teacher's assistant, and evaluate the performance of the day care facility attendants and administrative staff (10%);
9. Act as the Executive Officer or President of the business organization, and represent SUPREME CHILD CARE & DEVELOPMENT CENTER in all governmental administrative proceedings as well as with relevant business associations and organizations (5%);
10. Conduct and control meetings with the Supervisor of Education, lead teachers, kindergarten teachers, teacher's assistants, infant, toddler and playground attendants, nutrition, sanitation and transportation employees (5%);
11. Analyze monthly enrollment and income, and determine necessary changes or adjustments to the organization's goals, objectives, policies, budgetary and strategic plans (10%);
12. Continuous review of financial reports and balance sheets to determine the business organization's profitability and competitiveness, and necessary actions to accomplish its short term and long term goals and objectives (5%);
13. Design plans and policies for future development or expansion of licensed child care facilities and authorized preschool education centers, to improve the brand name or goodwill of the business organization, and to maintain or improve customer relations with the children's parents, employees, and the general public (10%); and
14. Review and approve contracts with suppliers and vendors including services for electricity, telephone, water, landscaping, air conditioning, painting, food and educational materials (5%).

The petitioner submitted its 2008 organizational chart, depicting the beneficiary at the top as President, followed below by an Educational Director, The Assistant Director is depicted as directly overseeing: an Infant Lead Teacher, ; a Toddler Lead Teacher, a Two's Lead Teacher, a Three's Lead Teacher, a Preschool Lead Teacher, an After School Teacher, a Cook Cleaning [employee] and a Transportation Driver.

The petitioner also submitted brief position descriptions for its U.S. employees. In relevant part, the Educational Director, Andrea Garzee, is described as performing the following functions:

1. Creating, delivering and ensuring a safe, caring and academically and socially enriching program for preschool and/or school-age children, by directing and overseeing the educational and regulatory functions of a high quality program;
2. Prepares and submits reports to the president; and
3. Confers with parents and teachers.

The Assistant Director, is described as performing the following functions:

1. Takes the responsibilities and duties of the Director during his absence;
2. Teach, educate, and monitor children as needed;
3. Assist the Director with the operation of the school, ensuring that the school is operating in accordance with company and state licensing standards.

The director denied the petition, concluding that the petitioner failed to establish beneficiary will be employed in a primarily executive or managerial capacity. In denying the petition, the director concluded that the major part of the beneficiary's duties comprise the daily productive or operational tasks of the day care and preschool.

On appeal, counsel for the petitioner asserts that the beneficiary "does not perform any activity, or physical labor, or productive service to attend to the infants and children in the day care facility, or instruct any children in the preschool facility" that would constitute performing non-qualifying duties. Counsel asserts that the beneficiary's proposed job duties are "entirely executive or managerial" in nature.

Upon review of the evidence and for the reasons herewith, the AAO finds that the petitioner failed to establish beneficiary will be employed in a primarily executive or managerial capacity, although for different reasons discussed by the director. The AAO reviews each appeal on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The petitioner's description of the beneficiary's proposed job duties in the United States is vague, duplicative, and not entirely consistent with the evidence in the record. First, the petitioner described the beneficiary's proposed job duties in vague and overly broad terms, such as "[e]stablish the goals, objectives, and policies for the day care facility and the preschool education facility," "[f]ormulating and developing plans and strategies in order to achieve the short term and long term goals and objectives of the business organization," "[c]oordinate daily, weekly and monthly programs," "[a]ct as the Executive Officer or President of the business organization," and "[d]esign plans and policies for future development or expansion of licensed child care facilities and authorized preschool education centers, to improve the brand name or goodwill of the

business organization, and to maintain or improve customer relations with the children's parents, employees, and the general public." These types of vague and broad descriptions are insufficient to establish what the beneficiary will do on a daily basis. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any meaningful detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.*

Some of the beneficiary's listed job duties are duplicative of each other or of the duties of the Educational Director. For example, the petitioner listed approximately four separate duties involving establishing goals, objectives, policies, plans, and strategies for the U.S. business. The petitioner listed approximately two separate duties involving supervising and evaluating the Supervisor of Education position. The petitioner listed approximately three separate duties involving reviewing and analyzing the business's finances and budget. In addition, on Form I-140, the petitioner listed one of the beneficiary's primary job duties as "planning, directing, and coordinating the academic and nonacademic activities and programs of preschool and child care center." Similarly, the petitioner described one of the Educational Director's primary job duties as "directing and overseeing the educational and regulatory functions of a high quality program." Therefore, the record is not clear what the beneficiary will actually do on a day-to-day basis, particularly in relation to the Educational Director.

Furthermore, some of the beneficiary's job duties are not entirely credible or consistent with the evidence in the record. For example, several of the beneficiary's job duties involve working with the other positions of "Supervisor of Education" and "Supervisor of Nursery, Toddler, Playroom, Playground, Health and Nutrition Care," but no such positions are depicted in either of the petitioner's organizational charts. In addition, one of the beneficiary's job duties is to "[a]nalyze, adjust, and approve the budgets which the Director has outlined for each segment of the business organization." However, the record reflects that the beneficiary himself is the Director, and none of his listed job duties explicitly entailed creating a budget. Overall, based on the vague, duplicative, and inconsistent description of the beneficiary's proposed job duties in the United States, the petitioner has failed to establish with sufficient clarity and detail what the beneficiary's actual job duties will be on a day-to-day basis.

In addition, the petitioner failed to adequately explain what job duties the Educational Director will perform on a daily basis. The Educational Director's job duties were described in vague and overly broad language, such as "[c]reating, delivering and ensuring a safe, caring and academically and socially enriching program for preschool and/or school-age children, by directing and overseeing the educational and regulatory functions of a high quality program." As discussed above, the petitioner claimed that the beneficiary would "[p]lan, direct, and coordinate the academic and nonacademic activities and programs of preschool and child care center," similar to the Educational Director's primary job duty of directing the petitioner's program.

The petitioner's failure to provide adequate position descriptions for the Educational Director is critical to the issue at hand. In order for the beneficiary to be employed in a primarily managerial or executive capacity, he

must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are supervisory, professional, or managerial. *See* Sections 101(a)(44)(A)(ii), (iv) of the Act; Section 101(a)(44)(B)(i) of the Act. *See also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988). The petitioner has failed to establish that the beneficiary's direct subordinate, the Educational Director, is a supervisory, professional, or managerial employee, notwithstanding her title. Inflated job titles are not probative and will not establish that an employee is employed in a supervisory, professional, or managerial position.

Finally, the petitioner failed to clarify whether the beneficiary will be employed in an executive or managerial capacity. In a letter accompanying the initial petition, the petitioner asserted that it needs the beneficiary's "managerial services." In response to the RFE, the petitioner asserted that the beneficiary will be performing the duties of "the principal executive officer." On appeal, counsel asserts that the beneficiary's proposed job duties are "entirely executive or managerial." The petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Based on the above, the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Although the appeal will be dismissed, the AAO withdraws the director's finding that the beneficiary may not be considered an employee of the petitioner.

The director found that the beneficiary may not be considered an employee of the petitioner because "the beneficiary is the petitioner. He will control the organization; he cannot be fired; he will report to no one; he will set the rules governing his work." The director cited to *Clackamas Gastroenterology Assoc., P.C. v. Wells*, 538 U.S. 440, 448-49 (2003) and "*New Compliance Manual*" to support the assertion that a worker may only be defined as an "employee" if he or she is subject to the organization's control.

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. at 448-49 (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]

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 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. Conclusion

The petitioner has failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. 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 not been met.

ORDER: The appeal is dismissed.

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[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.