



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

DATE: OFFICE: NEBRASKA SERVICE CENTER [Redacted]

**JUN 27 2013**

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:

[Redacted]

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 \$585. 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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a limited liability company organized in the State of Arizona. It 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 based on two independent grounds of ineligibility: (1) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; and (2) the petitioner failed to establish that it has an employer-employee relationship with the beneficiary due to his claimed majority ownership of the petitioning company.

On appeal, counsel disputes each ground as a basis for denial and submits a brief asserting that the director failed to corroborate his findings with "solid evidence."

#### I. The Law

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 and managers who have previously worked for 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 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.

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. 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.

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

First, contrary to counsel's assertion, it is not impossible for a top-level employee who heads an organization to perform non-qualifying tasks in addition to those tasks that are managerial or executive. In order to determine whether the beneficiary would be employed in a qualifying managerial or executive capacity, USCIS considers a combination of relevant factors. As indicated above, the first factor to be considered is the petitioner's description of the beneficiary's proposed job duties. USCIS will then consider the information pertaining to the job duties in light of the beneficiary's placement within the petitioner's organizational hierarchy and the petitioner's staffing, both of which will allow USCIS to gauge the petitioner's overall ability to relieve the beneficiary from having to primarily perform non-qualifying tasks. It is noted that in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Thus, counsel is incorrect in asserting that the size of the petitioning entity is entirely irrelevant to the issue of the beneficiary's employment capacity.

Second, counsel suggests that USCIS may assume that the beneficiary primarily performs qualifying tasks because the petitioner has indicated that it has staff to perform daily operational tasks associated with the petitioner's four retail stores. This contention is premised on the underlying assumption that the only non-qualifying tasks would be those associated with the actual retail functions at the petitioner's stores. This assumption, however, is erroneous, as there are numerous administrative, marketing and other non-qualifying functions related to the operation of a chain of retail stores that are not directly related to the day-to-day retail sales at the individual stores. For instance, in the present matter, the petitioner pointed out the beneficiary's "superior marketing abilities" and provided a list of job duties that includes developing marketing plans, conducting comprehensive marketing for product promotion and awareness, directing and coordinating product promotion, directing marketing research, and directing the gathering of product data on competitors and customer preferences.

While the job duties listed above imply that others within the petitioner's organization would actually carry out the work that the beneficiary would direct and coordinate, the petitioner's organizational chart identifies only one marketing employee. It is unclear that a single employee could successfully relieve the beneficiary from having to primarily engage in the performance of these non-qualifying marketing tasks. 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).

The job description offered in support of the petition also states that the beneficiary would "[c]oordinate activities of the domestic and international marketing departments and customer and feedback departments." However neither of these departments is identified in the petitioner's organizational chart. As such, it is

unclear which employees would comprise the marketing and customer feedback departments or whether these employees were working for the petitioner at the time the petition was filed. 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)).

Further, the AAO notes that, despite counsel's contention that the beneficiary does not perform any duties associated with the petitioner's retail operations the beneficiary's worksite is identified as [REDACTED]

[REDACTED] which is identified in the record as the address of one of its four retail stores, [REDACTED]

[REDACTED] The petitioner indicates that this location is staffed by an assistant manager, one cashier, and one stock person, but it has not provided the store operating hours or evidence of wages paid to employees as of the date of filing to establish that this level of staffing is sufficient to perform all retail sales-related tasks on a daily basis for this particular location.

Lastly, the petitioner's use of such general terms as "direct" and "coordinate" in its descriptions of the beneficiary's duties is insufficient to convey a meaningful understanding of the specific tasks the beneficiary would perform. As indicated above, the regulations expressly require that the petitioner provide a detailed description of the beneficiary's proposed job duties, which are crucial in determining whether the beneficiary would be employed in a qualifying capacity. Reciting the beneficiary's vague job responsibilities or broadcast business objectives is not sufficient; 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). In the present matter, the petitioner stated that the beneficiary would direct and coordinate the petitioner's activities; coordinate activities of the domestic and international marketing departments; direct personnel who would conduct market research; direct, examine and analyze statistical data; direct the gathering of competitor and customer data; and direct the preparation of company directives. In each of these instances, the petitioner failed to clarify what specific actions the beneficiary would be expected to perform in his directorial role, i.e., the type of direction the beneficiary would provide, how the direction would be administered, and the extent to which the beneficiary would be involved in performing the underlying duties that require his direction. In other words, while the petitioner generally conveyed the heightened degree of discretionary authority the beneficiary would assume in his position as head of the petitioner's hierarchy, it failed to clarify the specific tasks the beneficiary would perform on a daily basis.

In summary, the petitioner failed to provide the required detailed description of the beneficiary's proposed job duties and failed to provide sufficient evidence to establish that it is adequately staffed to relieve the beneficiary from having to primarily engage in the performance of non-qualifying tasks. Therefore, in light of these significant deficiencies, the AAO cannot conclude that the beneficiary's proposed position with the U.S. entity would be within a qualifying managerial or executive capacity. On the basis of this determination, the instant petition cannot be approved and the appeal will be dismissed.

- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

## II. U.S. Employment in a Managerial or Executive Capacity

The first issue to be addressed is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity.

In support of the Form I-140, the petitioner submitted a letter dated February 21, 2007, which included a list of the beneficiary's proposed job duties. The petitioner indicated that the beneficiary's activities would include developing the petitioner's market plan, ensuring awareness and promotion of company products, and directing market research and the development of new markets for the petitioner's products. The petitioner's support letter emphasized the beneficiary's negotiation skills based on his prior negotiations with traders, vendors, and suppliers and further stressed the beneficiary's marketing abilities.

The petitioner also provided a copy of its organizational chart, which depicts the beneficiary's proposed position of president at the top of the hierarchy, followed by a marketing manager and a vice president as the beneficiary's two immediate subordinates. The third tier of the hierarchy depicts two store managers each of whom oversees an assistant manager assigned to one of the petitioner's four convenience store locations. The two bottom tiers are occupied by a cashier and a "stockist," respectively, in each store. The petitioner also produced 2006 IRS Form W-2s for 14 of the 17 individuals named in the organizational chart. It is noted, however, that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). While many of the individuals to whom IRS Form W-2s were issued in 2006 correspond to the names found in the petitioner's organizational chart, the tax documents do not establish whom the petitioner employed as of March 2, 2007 when the instant Form I-140 was filed.

In a decision dated December 9, 2008, the director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity.

In order to determine whether the beneficiary would be employed in a qualifying executive or managerial capacity, U.S. Citizenship and Immigration Services (USCIS) will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). In the instant matter, counsel asserts on appeal that it would be impossible for the beneficiary to perform day-to-day duties at the petitioner's four different store locations, unless the beneficiary were to primarily focus on lending his services to a single store location. Counsel further states that the beneficiary is not engaging and would not engage in the day-to-day operational tasks, implying that the beneficiary cannot perform both the non-qualifying operational tasks required to operate the petitioner's retail outfits and the qualifying executive or managerial tasks required to run a multi-million dollar operation. Counsel's argument, however, is not persuasive.

### III. Beneficiary as Majority Owner and Employee

The second and final basis for denial of the petition was based on the director's conclusion that the beneficiary, as the majority owner of the petitioning limited liability company, may not be considered an employee of the petitioner.

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). The director further noted that the definitions of managerial and executive capacity require the beneficiary to be an employee of both the foreign and U.S. companies. The director determined that, "as there is no individual or board that will supervise the beneficiary's work or has the authority to hire or fire the beneficiary, the beneficiary must be considered the employer and not the employee."

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.<sup>1</sup>

In the present matter, the director's use of the employer-employee issue appears to be an attempt to address 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. 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. Employment Abroad in a Managerial or Executive Capacity

Finally, while not cited in the director's decision as a basis for denial, the AAO finds that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity, per 8 C.F.R. § 204.5(j)(3)(i)(B).<sup>2</sup> Similar to the petitioner's description of the beneficiary's proposed employment, the petitioner used general terms to describe the beneficiary's broad job responsibilities, which did not convey a meaningful understanding of the specific tasks the beneficiary performed in his position with the foreign entity. 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 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). The evidence of record is insufficient to establish that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity.

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<sup>1</sup> 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.

<sup>2</sup> The record of proceeding shows that a previously filed Form I-140, with receipt number [REDACTED] was denied by the Director, California Service Center, on July 22, 2005 and that the denial was based, in part, on the finding that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. This finding was affirmed by the AAO on appeal in a decision dated February 23, 2006.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional ground of ineligibility discussed above, this petition cannot be approved.

#### IV. Conclusion

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.