



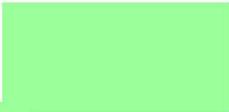
U.S. Citizenship  
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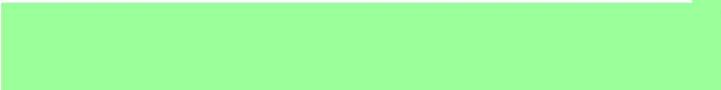


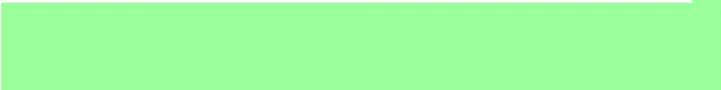
Date: JUN 27 2013

OFFICE: NEBRASKA SERVICE CENTER

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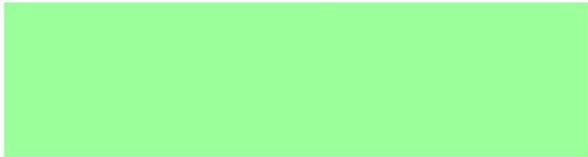
IN RE:

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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the decision of the director and remand the matter for further action and entry of a new decision.

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, an Ohio corporation registered as a foreign corporation in Michigan, operates a lodging establishment under the [REDACTED] franchise. It claims to be an affiliate of the beneficiary's foreign employer, [REDACTED]. The petitioner seeks to employ the beneficiary as its President.

The director denied the petition based on a finding that the petitioner failed to establish that the beneficiary, who is claimed to be the majority owner of both the petitioner and the foreign entity, is an employee of either company.

On appeal, counsel for the petition objects to the director's finding, asserting that the reason for denial was "based on a wrong interpretation and application of regulations and decisions."

### 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.

## II. Beneficiary as Employee and Majority Owner

The director denied the petition after concluding that the beneficiary, as the majority shareholder of the petitioning and foreign entities, may not be considered an employee of the petitioner or the foreign entity. Citing *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992) and *Clackamas Gastroenterology Assoc., P.C. v. Wells*, 538 U.S. 440, 448-49 (2003), the director noted that the beneficiary does not meet certain requirements in order to be considered an "employee," and therefore is ineligible for the benefit sought. The director raised no other grounds for denying the petition.

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.<sup>1</sup>

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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.

Upon review, the beneficiary's employer-employee relationship with the foreign and U.S. entities 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. Additional Issues

Although the director's original basis for denial will be withdrawn, there are other deficiencies in the record which prevent a finding that the petitioner and beneficiary are qualified for the benefit sought.

First, the the petitioner has failed to present sufficient evidence to establish that the beneficiary has been and will be employed in a qualifying managerial or executive capacity.

In reviewing the petitioner's descriptions of the beneficiary's job duties abroad and his proposed job duties in the United States, the AAO finds that the information provided is overly vague and fails to describe the job duties with adequate specificity. For instance, the petitioner described the beneficiary's job duties abroad in broad terms, such as "co-ordinate day to day running of the Company and focus on business prospects," "[t]ake active role in Company projects and appraisal," and "[e]nsure that the Company operates in line with Government policy, regulations and procedures." Likewise, the petitioner described the beneficiary's proposed job duties in the United States in general terms, such as "[d]irect and coordinate an organization's financial and budget activities in order to fund operations, maximize investments, and increase efficiency," "[a]nalyze operations to evaluate the performance of a company and its staff in meeting objectives," and "direct, plan and implement policies, objectives and activities of organizations or businesses in order to ensure continuing operations, to maximize returns on investments, and to increase productivity."

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 record also contains insufficient information regarding the organizational structure and staffing levels of the U.S. and foreign entities. While the petitioner submitted an organizational chart for the foreign entity, the petitioner did not submit an organizational chart for the U.S. entity or any detailed duty descriptions for its employees. Furthermore, the petitioner did not submit any current payroll or other related evidence confirming the U.S. and foreign entity's staffing levels.<sup>2</sup> It is therefore unclear who is providing the day-to-day services of the petitioner's business operations.

Second, the the record lacks sufficient evidence to establish that the petitioner and the foreign entity have a qualifying relationship. To establish a "qualifying relationship" under the Act and the regulations, the

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<sup>2</sup> Although the petitioner submitted the U.S. entity's payroll register from 2006, this evidence is too dated to give an accurate depiction of the U.S. entity's staffing at the time of filing. The instant petition was filed in February 2010.

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"). Here, the petitioner claims to be an affiliate of the foreign entity based upon the beneficiary's majority ownership of both entities.

However, the record contains incomplete and conflicting evidence regarding the beneficiary's ownership in the U.S. and foreign entities. The petitioner claims that the beneficiary owns 60% of the U.S. entity. As evidence of the beneficiary's ownership interest, the petitioner submitted its stock certificates issued to the beneficiary for 60 shares of voting stock, and to [REDACTED] for 50 shares of voting stock.<sup>3</sup> However, as general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. 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 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.*, 19 I&N Dec. 362 (Comm'r 1986). Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control. Furthermore, the petitioner's 2008 Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation, indicates that the petitioner has only one shareholder. This contradicts the ownership structure claimed by the petitioner and as represented by the submitted stock certificates.

Moreover, the petitioner claims that the beneficiary owns 55% of the foreign entity. Specifically, the petitioner claims that the beneficiary initially held 50% of the shares of the foreign entity when it was incorporated in 1979, and then on August 29, 2000, he purchased additional shares, bringing his total ownership interest in the foreign entity to 55%. As evidence of the beneficiary's ownership in the foreign entity, the petitioner submitted the following:

1. The foreign entity's undated company profile showing that the beneficiary owns 2,500,000 shares of the corporation's total 5,000,000 share capital, representing 50% ownership;
2. The foreign entity's record of transfer of shares, dated August 31, 2000, showing that the beneficiary purchased 250,000 shares from [REDACTED] resulting in the beneficiary owning a total of 2,750,000 shares [representing 55% ownership];
3. The foreign entity's share certificate issued to the beneficiary on September 1, 2000 for 2,750,000 shares; and
4. The foreign entity's record of an increase of shares, dated March 28, 2005, showing that the foreign entity increased its total share capital from 5,000,000 shares to 50,000,000 shares, resulting in the beneficiary owning a total of 12,500,000 ordinary shares at K2.00 each [for a total of 25,000,000 shares, representing 50% ownership].<sup>4</sup>

<sup>3</sup> The petitioner is authorized to issue a total of 2,000 shares.

<sup>4</sup> The AAO assumes that this document contains a typographical error indicating that the beneficiary owns a total of 12,500,000 ordinary shares at K1.00 each, instead of a total of 12,500,000 ordinary shares at K2.00

At issue here is the foreign entity's record of an increase of shares, dated March 28, 2005, showing that the beneficiary owns a total of 25,000,000 shares, representing 50% ownership. This document contradicts the petitioner's assertion that the beneficiary owns 55% of the foreign entity. Based on the conflicting evidence, the credibility of the petitioner's assertions regarding the beneficiary's ownership interests and the submitted evidence is undermined.

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.*

#### 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 August 17, 2010 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.

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each. The rest of the document indicates that the company's share capital is valued at K2.00 per share. 12,500,000 ordinary shares at K2.00 per share results in the beneficiary owning 50% of the foreign entity. If the beneficiary held 12,500,000 ordinary shares at K1.00 each, he would own only 25% of the foreign entity, and the total number of shares issued to him and the two other shareholders would not equal 100%.