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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



U.S. Citizenship
and Immigration
Services



Date: JUN 27 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 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 withdraw the decision of the director and remand the matter for further action.

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 Texas corporation, is a distributor of consumer goods. It claims to be the wholly owned subsidiary of the beneficiary's foreign employer, Cat Walk Shoes (the foreign entity), located in India. The petitioner seeks to employ the beneficiary as its Chief Executive Officer (CEO).

The director denied the petition, concluding that the beneficiary, as the sole owner of the foreign entity that purportedly owns 100% of the petitioning company, cannot be considered an employee of the petitioner.

On appeal, counsel asserts that the denial is based on irrelevant authority and a misapplication of the law. Counsel submits a brief and additional evidence in support of the appeal.

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.

8 U.S.C. § 1101(a)(44) (emphasis added).

II. Beneficiary as Employee and Sole Owner

The director denied the petition after concluding that the beneficiary, as the sole owner of the foreign entity that purportedly owns 100% of the petitioning U.S. entity, may not be considered an employee of the petitioner. 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. The director found that the beneficiary is not controlled by the petitioner because "the beneficiary is the petitioner for all practical purposes. She will control the organization; she cannot be fired; she will report to no one; she will set the rules governing her work; and she will share in all the profits and losses." 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. 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.¹

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"

Upon review, the beneficiary's employer-employee relationship with the foreign and petitioning 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 additional deficiencies in the record which prevent a finding that the petitioner and beneficiary are qualified for the benefit sought, and the appeal cannot be sustained based on the record as presently constituted.

First, the AAO finds that the record contains insufficient evidence to establish that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity.

The petitioner's descriptions of the beneficiary's job duties are vague and unclear. In one letter, the petitioner described the beneficiary's job duties in overly broad terms such as "direct and coordinate an organization's financial and budget activities," "direct, plan, and implement policies, objectives, and activities of organizations or businesses," and "direct and coordinate activities of businesses or departments concerned with product sourcing, pricing, sales, or distribution of products." In another letter entitled "Job Description for the position of President/Chief Executive Officer [the beneficiary]," the petitioner confusingly stated that the beneficiary "will delegate her authority to subordinate managers who will actually perform the following tasks and will report to the CEO/President of the corporation," and then proceeded to list several job duties that are both qualifying and non-qualifying in nature. It is unclear whether the listed job duties are for the beneficiary or for her purported subordinate managers, considering the title of the document and that the petitioner provided separate job descriptions for its office manager, vendor relations manager and marketing manager.

Based on the petitioner's vague and unclear descriptions, the petitioner has failed to provide any meaningful detail or explanation of the beneficiary's actual activities in the course of her daily routine. 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. *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. The actual duties themselves will reveal the true nature of the employment. *Id.*

Furthermore, the petitioner has failed to provide any detailed explanation, along with credible and probative supporting documentation, establishing the U.S. entity's overall organizational structure, staffing levels, and the scope of its business activities at the time of filing. Based on the evidence in the record, it appears that the petitioner and its claimed subsidiary, [REDACTED] run approximately four different gas stations/convenience

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.

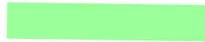
stores in Tennessee and Texas. However, the record is unclear as to exactly how many gas stations/convenience stores the petitioner actually operates and from what addresses, as much of the evidence the petitioner submitted with the instant petition was outdated, contained different addresses for the same business name, or pertained solely to [REDACTED]. The record is also unclear as to what the beneficiary's actual role will be with regards to each separate location, as well as what the actual staffing levels of each location will be. The petitioner provided generic job descriptions for an office manager, vendor relations manager and marketing manager, but provided no actual proof of employment or any type of explanation regarding these positions, such as the names of the individuals holding these positions, and at what location(s) these individuals work. The petitioner also provided no other job descriptions or explanations regarding any of its other employees, if any. Considering the petitioner's claim that it operates several gas stations/convenience stores in two different states, it is unclear who is actually performing the day-to-day functions of the U.S. operations. Overall, the record is insufficient to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

Second, 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 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").

In the present matter, the petitioner claims to be a wholly owned subsidiary of the foreign entity. However, the petitioner failed to provide credible evidence establishing the foreign entity's purported ownership of the U.S. entity. Specifically, the petitioner has provided a total of three different versions of its stock certificate purportedly issued to the foreign entity for 1000 shares. This evidence includes two different stock certificates numbered 1001 containing different signatures, and one stock certificate numbered 10050. 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. at 591-92. 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.*

In addition, the petitioner claims that [REDACTED] is its wholly owned subsidiary. To support this assertion, the petitioner submitted a copy of [REDACTED] stock certificate number 1, issued to the petitioner for 1000 shares on January 5, 2007. However, according to [REDACTED] federal tax returns (including the accompanying schedule K forms) filed in 2006 and 2008, [REDACTED] indicated that its owners are the beneficiary and [REDACTED] each owning 50% of the corporation's stocks. [REDACTED] 2008 federal tax return specifically indicated that no foreign or domestic company owned 20% or more of its total stock.

Based on the lack of credible, consistent evidence in the record, the record as presently constituted does not support the petitioner's claim that it is wholly-owned by the foreign entity, or that [REDACTED] is its wholly-owned subsidiary.



IV. Conclusion

Based on the foregoing discussion, the director's decision will be withdrawn and the matter will be remanded for review and entry of 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 March 23, 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.