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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

[Redacted]

DATE: **MAY 02 2013** OFFICE: TEXAS SERVICE CENTER FILE: [Redacted]

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.

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 withdraw the director's decision and remand the matter for further consideration and entry of a new decision.

The petitioner is a Texas corporation that seeks to employ the beneficiary as president/chief executive. 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 concluding that the petitioner failed to establish that the petitioner had a qualifying relationship with the beneficiary's foreign employer. Specifically, the director determined that "a qualifying relationship does not exist between the petitioner and the foreign parent company because the petitioner operates as a [redacted] franchise and primary control of the business resides with [redacted]."

On appeal, counsel provided a comprehensive appellate brief along with new documentary evidence, AAO unpublished opinions, and other evidence already presented in the record. Counsel asserts that the petitioner's operation of a franchised business does not prohibit a finding that it has a qualifying relationship with the beneficiary's foreign employer.

Upon reviewing the record in its entirety and considering supplemental submissions on appeal, the AAO finds that the petitioner has submitted sufficient evidence to overcome the director's adverse decision. Accordingly, the director's decision, dated June 20, 2012 will be withdrawn.

Notwithstanding this favorable conclusion, the AAO finds that the record lacks sufficient evidence to establish that the beneficiary had been employed abroad or would be employed in the United States in a qualifying managerial or executive capacity. Accordingly, the AAO will remand the petition for further action and entry of a new decision.

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 or managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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.

At issue in this decision was whether the petitioner had established a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. See section 203(b)(1)(C) of the Act.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

On review, the director incorrectly focused on the petitioner's operation of a franchise rather than on the necessary qualifying relationship between the beneficiary's foreign employer and the U.S. petitioner. The director noted that the franchise agreement gave the franchisor final say in the methods and standards of the operation and that the fundamental aspects of the business were ultimately controlled by the franchisor. Therefore, the director found that no qualifying relationship existed between the petitioner and the beneficiary's foreign employer because the primary control of petitioner, as a franchise owner, resided with the franchisor.

The regulations and case law confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are "ownership" and "control." *Matter of Siemens Medical Systems, Inc.* 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); see also *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In general, a "franchise" is a cooperative business operation based on a contractual agreement in which the franchisee undertakes to conduct a business or to sell a product or service in accordance with methods and procedures prescribed by the franchiser, and, in return, the franchiser undertakes to assist the franchisee through advertising, promotion, and other advisory services. A franchise agreement, like a license, typically requires that the franchisee comply with the franchiser's restrictions, without actual ownership and control of the franchised operation. See *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970) (finding that no qualifying relationship exists where the association between two companies was based on a license and royalty agreement that was subject to termination since the relationship was "purely contractual"). An association between a foreign and U.S. entity based on a contractual franchise agreement is usually insufficient to establish a qualifying relationship. *Id.*

By itself, the fact that a petition involves a franchise will not automatically disqualify the petitioner. When reviewing a petition that involves a franchise, the director must carefully examine the record to determine how the franchise agreement affects the claimed qualifying relationship. As discussed, if a foreign company enters into a franchise, license, or contractual relationship with a U.S. company, that contractual relationship can be terminated and will not establish a qualifying relationship between the two entities. See *Matter of Schick*, 13 I&N Dec. at 649. However, if a foreign company claims to be related to a U.S. company through common ownership and control, and that U.S. company is doing business as a franchisee, the director must examine whether the U.S. and foreign entities possess a qualifying relationship through common ownership and management.

Nonetheless, it is critical in all cases that the petitioner fully disclose the terms of any franchise agreement, especially as the agreement relates to the transfer of ownership, voting of shares,

distribution of profit, management and direction of the franchisee, or any other factor affecting actual control of the entity. *Cf. Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 364-65.

In the present matter, the record reflects that the petitioner was incorporated in the State of Texas as a separate legal entity. It is the relationship between this petitioner and the foreign company that requires consideration. While the franchise agreement between the petitioner, as franchisee, and the franchisor is included in the record it does not disclose any relevant information regarding this issue. Rather, the relevant issue is whether common ownership and control existed between the petitioner, as a separate United States entity, and the foreign company at the time the petition was filed. As previously noted, the director incorrectly focused this decision on the franchise agreement. Accordingly, the director's findings regarding the franchise agreement are withdrawn.

Upon review of the record, the petitioner had provided evidence of ownership and control of the U.S. and foreign entities and has established that they have a qualifying affiliate relationship in accordance with 8 C.F.R. 204.5(j)(2)(A).

As noted, the AAO finds the record lacks sufficient evidence to establish that the beneficiary had been employed abroad, or would be employed in the United States, in a qualifying managerial or executive capacity.

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.

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

In this matter, the petitioner included a description of the beneficiary's employment abroad but it lacked sufficient detail about the beneficiary's specific daily job duties and did not establish that his primary tasks were within a qualifying managerial or executive capacity. In addition, the petitioner did not provide sufficient information or documentation with regard to the foreign company's organizational hierarchy to establish the availability of a support staff who would relieve the beneficiary from having to primarily perform non-qualifying job duties associated with the day-to-day operations of the business. 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). Without sufficient information to establish what specific job duties the beneficiary performed during his employment abroad, the AAO cannot conclude that the petitioner meets the provisions of 8 C.F.R. § 204.5(j)(3)(i)(B).

Additionally, with regard to the beneficiary's proposed position with the U.S. petitioner, the regulation at 8 C.F.R. § 204.5(j)(5) requires the petitioner to provide a detailed description of the beneficiary's proposed job duties. Case law further emphasizes the need for a detailed job description, finding that the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The record as presently constituted contains a vague job description that focuses on the beneficiary's general duties and overall responsibilities. The job description fails to cite specific tasks the beneficiary would perform or allocate a percentage of time the beneficiary would spend on the duties discussed. Finally, the petitioner fails to establish who within the company would relieve the beneficiary from having to perform the daily operational tasks, which, while necessary for the petitioner's daily function, would nevertheless be deemed as non-qualifying. In order to be classified as a multinational manager or executive, the primary portion of the

beneficiary's tasks must be of a managerial or executive nature rather than tasks necessary to produce a product or to provide services. *See Matter of Church Scientology International*, 19 I&N Dec. at 604.

While a final determination regarding the beneficiary's employment capacity is not solely based on the petitioner's organizational hierarchy, this factor can and should be considered, as it helps to assess a company's overall ability to relieve the beneficiary from having to primarily perform tasks outside of a qualifying managerial or executive capacity. *See 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)). In the present matter, the petitioner has not provided sufficient documentation to establish its ability to relieve the beneficiary from having to primarily perform non-qualifying tasks. As such, the beneficiary's proposed employment has not been shown as being primarily within a qualifying managerial or executive capacity.

Based on the foregoing discussion, while the AAO will remand this matter back to the director for further action, it finds that the record as presently constituted does not establish that the petitioner and beneficiary are eligible for the immigration benefit sought. In reviewing the record, the director may request additional evidence per the above discussion as well as any other evidence the director deems necessary to determine the petitioner's eligibility for the immigration benefit sought.

ORDER: The director's decision dated June 20, 2012 is hereby withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision, which, if adverse to the petitioner, shall be certified to the AAO.