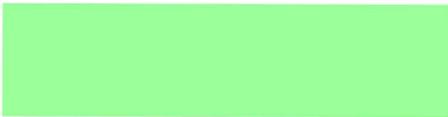


U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave. N.W., MS 2090  
Washington, DC 20529-2090



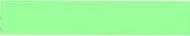
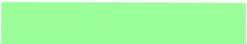
U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **MAY 08 2013**

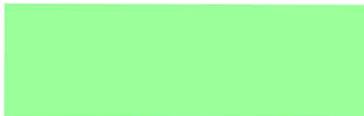
OFFICE: TEXAS SERVICE CENTER

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry 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 The decision of the director will be withdrawn and the appeal will be sustained.

The petitioner is a Texas corporation operating in the United States as a freight forwarding agency. 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.

In denying the petition, the director determined that the petitioner failed to establish that: (1) the beneficiary was employed abroad in a qualifying managerial or executive capacity; (2) the beneficiary would be employed in the United States in a qualifying managerial or executive capacity; and (3) the petitioner has a qualifying relationship with the entity abroad where the beneficiary was previously employed.

On appeal, counsel submits an appellate brief thoroughly expounding the beneficiary's foreign and proposed positions and pointing to documentation that adequately addresses and dispels the director's concerns regarding the common ownership of the foreign and U.S. entities.

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.

The first issue the AAO will address in this proceeding is the petitioner's qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign and proposed U.S. employers are the same employer (i.e. a U.S. entity with a foreign office) or that the two entities are 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").

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.

The record contains adequate documentation establishing the ownership of the U.S. and foreign entities. Specifically, with regard to the petitioner's ownership, the record has been supplemented with 2009 and 2010 partnership tax returns, a stock transfer ledger with a list of all transfers and acquisitions, minutes of special meetings which took place on April 16, 1997 and January 2, 2002, and canceled and current stock certificates. All of the presented documentation establishes that [REDACTED] owns 55%, or a majority, of the petitioning entity's stock.

With regard to the ownership of the foreign entity, the petitioner provided the following documents: (1) the articles of organization of [REDACTED] which was the original foreign entity established on February 1, 1995; (2) minutes of extraordinary meeting of partners where such meetings took place on July 30, 1998, March 26, 2003, July 24, 2007, and October 2, 2009; (3) the articles of organization of [REDACTED] which was established on April 19, 2007; and (4) documents showing that the latter entity assumed control, assets, and obligations of [REDACTED]

After examining all of the above, including the foreign entity's English language translations, the AAO finds that all documents consistently identified [REDACTED] as majority stockholder of the foreign entity owning 52% of the stock. Despite the director's interpretation of the translations, the AAO finds that the documents do not indicate that Ms. [REDACTED] relinquished control of the foreign entity. As pointed out in counsel's appellate brief, the director's interpretation of the translated documents is incorrect. While it is true that the daily management of the foreign entity is accomplished by a board of directors, such individuals serve at the will of the stockholders. As Ms. [REDACTED] has repeatedly been shown as the majority stockholder she in fact controls the foreign entity.

In light of the above, the AAO finds that the beneficiary's foreign employer and the petitioning entity are similarly owned and controlled by the same individual—Ms. [REDACTED]—and the two entities are therefore affiliates under the regulatory definition.

Next, the AAO will address the director's two remaining adverse findings with regard to the beneficiary's employment abroad and his proposed employment with the petitioning entity. 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). Additionally, the AAO finds that it is appropriate to consider other relevant factors, such as the level of complexity of an entity's organizational hierarchy and its overall staffing, which allow the AAO to gauge the extent to which the company was or would be able to relieve the beneficiary from having to focus the primary portion of his time on the performance of non-qualifying operational tasks.

The statutory definition of "managerial capacity" allows for both personnel managers and function managers. *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. The statute states that 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)(A)(iv) of the Act; 8 C.F.R. § 204.5(j)(4). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 204.5(j)(2).

Upon examining the record and giving consideration to the relevant factors, the AAO finds that the director failed to give proper weight to each entity's complex organizational hierarchy, the beneficiary's placement therein, and the availability of a support staff that includes professional employees, which allowed the beneficiary to spend his time primarily on the performance of qualifying tasks during his employment abroad and would similarly allow the beneficiary to focus his time primarily on qualifying tasks in his proposed employment with the U.S. entity.

While the petitioner's foremost responsibility is to establish that the beneficiary did not and would not "primarily" perform the tasks that are necessary to produce a product or to provide services, as such an employee is not considered to be "primarily" employed in a managerial or executive capacity, the AAO points out that no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks so long as the record contains sufficient evidence that the non-qualifying tasks the beneficiary would perform are only incidental, i.e., not the primary part, of the position(s) in question. *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). After considering the evidence as provided by the petitioner in light of the additional information that counsel provided in the appellate brief, the AAO finds that the petitioner has met its burden of proof in establishing that the beneficiary was more likely than not employed abroad in a qualifying capacity and that the petitioning entity would more likely than not employ the beneficiary in a similar 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. The petitioner has sustained that burden.

**ORDER:** The appeal is sustained.