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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 04 2015

FILE #:
PETITION RECEIPT #:

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 APPELLANT:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for 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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. We will remand the matter for further consideration and a new decision.

The petitioner, a producer of mobile devices, sought to employ the beneficiary in the United States as a device cloud manager. The appellant now seeks to employ him as a senior manager, The petitioner filed Form I-140, Immigrant Petition for Alien Worker, on October 28, 2013, seeking to classify the beneficiary as an employment-based immigrant under 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 on October 20, 2014, concluding (1) a qualifying relationship no longer exists between the petitioning U.S. employer and the beneficiary's prior foreign employer; and (2) the beneficiary's positions abroad and in the United States are/were not primarily managerial.

On appeal, the appellant submits a legal brief with supporting documentation. The appellant contends that, under section 204(j) of the Act, 8 U.S.C. § 1154(j), the petitioner need not demonstrate that a qualifying relationship still exists. The appellant also asserts that the beneficiary's primary duties meet the necessary requirements of a managerial position.

I. 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 the alien 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 only to 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 Form I-140 to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager. The regulation at 8 C.F.R. § 204.5(j)(5) states:

> No labor certification is required for this classification; however, 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 letter must clearly describe the duties to be performed by the alien.

Section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44), provides:

> (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.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

Finally, section 106(c) of AC21 amended section 204 of the Act by adding the following provision, codified as section 204(j) of the Act:

> Job Flexibility For Long Delayed Applicants For Adjustment Of Status To Permanent Residence – A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if

the new job is in the same or a similar occupational classification as the job for which the petition was filed.

II. Issues on Appeal

A. Employment in a Managerial Capacity in the U.S. and Abroad

A review of the facts and documentary evidence presented in the instant record indicates that the beneficiary assumed abroad the position of device senior software architect; that the petitioner sought to employ the beneficiary as a device cloud manager; and that the appellant now seeks to employ him as a senior manager, . The petitioner has established that each of these positions qualifies as a "function manager" under section 101(a)(44)(A) of the Act. While the record indicates that the beneficiary performs some non-qualifying tasks, the petitioner submitted sufficient evidence to establish that any non-qualifying components of the proposed position would not comprise the "primary" portion of his time. We note that no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks so long as the petitioner provides evidence to establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. 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). Here, the record indicates that the beneficiary devotes the primary portion of his time to higher-level tasks that require his level of expertise and discretionary authority with respect to the projects that he manages and with respect to the immediate staff employees available to relieve the beneficiary from performing non-managerial functions.

B. Qualifying Relationship

1. Facts

The regulation at 8 C.F.R. § 204.5(j)(3)(i) requires the petitioner to submit a statement from an authorized official of the petitioning United States employer which demonstrates that:

> * * *
>
> (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity; [and]
>
> (C) The prospective employer in the United States is the same employer or a

> subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas.

The regulation at 8 C.F.R. § 204.5(j)(2) defines the terms "affiliate" and "subsidiary." *Affiliate* means, in pertinent part:

> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual; [or]
>
> (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.

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 petitioner asserted that it is a wholly-owned subsidiary of based in , and that, from 2007 to 2012, the beneficiary worked in the United Kingdom for described as an affiliate of the petitioner. The petitioner submitted an undated "List of qualifying entities included within [the petitioner's] blanket L petition," which named A copy of 's Securities and Exchange Commission Form 20-F Annual Report for 2012 showed that the parent company had a 100% ownership interest and voting interest in the petitioning U.S. entity and the U.K. entity.

The director issued a request for evidence (RFE) on May 29, 2014. In that notice, the director stated that the parent company in "sold substantially all of its Devices and Services business to on as documented in s Form 20-F for the fiscal year ended 12/31/2013." The "Organizational Structure" section of the 2013 report listed the petitioner and the UK entity among the "Discontinued Companies," which "transferred to " in .

In the RFE, the director instructed the petitioner to submit evidence to establish that a qualifying relationship continues to exist between the petitioner and The director specifically stated that the RFE response "should include but is not limited to" the following materials:

- A copy of s complete list of present subsidiaries found in Statutory Accounts;
- Relevant sections of the transaction agreement between and highlighted and tabbed, which demonstrates what was transferred and what was not;

- Evidence establishing 's corporate status, its tax identification number, documentary evidence of any legal name changes, and corporate registration status; and
- Evidence establishing the current status of the foreign entity and . . . evidence of its current corporate registration status, evidence of any name changes, and evidence of whether it continues to do business.

The appellant responded to the RFE on August 22, 2014. The response did not include any of the specifically requested materials listed above. The appellant stated that the beneficiary "was **not** one of the employees that were transferred to . . . . [H]e was transferred to prior to the deal" (emphasis in original). The appellant submitted a translation of relevant portions of the parent company's *Operating Report and Account Closing 2013*. The translation of page 68 begins with the heading "'s Group Companies and Share Companies," followed by two columns of company names. The column on the left, with the heading "Continuing Operations," includes 100% "owned by parent company." The column on the right, with no heading, includes the names of the petitioning entity (in the United States and (UK) While the English translation shows no heading above the right-hand column, the original shows the heading ' The absence of a translation of this heading means that the translation is not complete, despite the translator's certification to the contrary. Furthermore, the certified English translation indicates that the parent company owns, or owned, 100% of the petitioning company, but the language original shows only a dash (-) where the translation shows "100.00." Both of these inaccuracies or omissions may be material to the issue at hand.

In the denial notice, the director stated that the RFE response did not establish that the required qualifying relationship still exists between the petitioner and the beneficiary's former foreign employer. On appeal, the appellant maintains that the qualifying relationship need not continue to exist, because section 204(j) of the Act permits the beneficiary to change employers 180 days after filing Form I-485, Application to Register Permanent Residence or Adjust Status.[1]

2. Analysis

In response the director's RFE, the appellant asserted that the beneficiary is eligible for portability pursuant to section 204(j) of the Act. The portability provisions apply to adjustment applications rather than to visa petitions, and they presume that the underlying petition has been approved or is approvable.[2] In the denial notice, the director did not address the appellant's assertion that the

[1] We note that on the sale occurred on April 25, 2014, 179 days after the petition's October 28, 2013 filing date.

[2] Although section 204(j) of the Act provides that an employment-based immigrant visa petition shall remain valid with respect to a new job if the beneficiary's application for adjustment of status has been filed and remained unadjudicated for 180 days, the petition must have been "valid" to begin with if it is to "remain valid with respect to a new job." *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010). To be considered valid in harmony with related provisions and with the statute as a whole, the petition must have been filed for an alien who is entitled to the requested classification and that petition must have been approved by a USCIS officer pursuant to his or her authority under the Act. An unadjudicated

beneficiary is eligible to port to a new job. As such, the matter will be remanded to the director, who is instructed to request additional evidence in order to make a final determination as to the beneficiary's eligibility.

The director shall request evidence demonstrating when the corporate relationship was severed between the petitioner ( ) and the foreign employer (. Further, the director may request any additional information deemed necessary to determine whether the beneficiary qualifies for portability under section 204(j) of the Act.

III. Conclusion

Based on the foregoing discussion, we will withdraw the director's decision and remand the petition to the director for further review, issuance of a new request for evidence, and entry of a new decision. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The decision of the director dated October 20, 2014 is hereby withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.

immigrant visa petition is not made "valid" merely through the act of filing the petition with USCIS or through the passage of 180 days. *Id.*