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FILE: [REDACTED]  
SRC 07 051 51495

OFFICE: TEXAS SERVICE CENTER

Date: **AUG 01 2008**

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:



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.

  
for  
Robert P. Wiemann, 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 appeal will be dismissed.

The petitioner is a Florida corporation claiming to be operating as a multi-facility car-care service provider. It seeks to employ the beneficiary as its General Manager. 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 determined that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity and denied the petition.

On appeal, counsel asserts that the petitioner's Form I-140 contained erroneous information and provides a brief disputing the director's conclusion regarding the petitioner's eligibility.

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.

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.

The primary issue in this proceeding is whether the beneficiary would be performing in a capacity that is primarily managerial or executive.

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. 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)(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 support of the Form I-140, the petitioner submitted a letter dated December 5, 2006, which includes the following list of the beneficiary's duties and responsibilities in his position as general manager:

- Seeking new items at better rates and negotiating payment terms. Analyzing and seeking new business ventures and opportunities, projects, costs [sic] analysis, meeting and negotiating with new clients. . . .

Soliciting new business, project costs analysis, reviewing and submitting bids, meeting and negotiating terms of agreements and obtaining credit arrangements . . . .

- Costs [sic] analysis and quality assurance of movies [sic] as well as negotiating payment terms and commitment as to approximate delivery schedules with others [sic] vendors/suppliers.
- Oversee[ing the] management of the company and the implementation of corporate goals and strategies within [the] budget for the attainment of long[-] and short[-]terms [sic] goals.
- Sales opportunity analysis including developing of the sale[s] plan.
- Supervise personnel. [Being i]n charge of hiring, firing and applying disciplinary measures as [the] situation arises. Prepare and analyze internal reports. This includes identifying time frames for employees' task and preparing times [sic] sheets for the payroll, [and] analyzing employee's [sic] performance[.] [The beneficiary] has several years of experience as a professional involved in the administration and operational fields, including the management of the parent company in Ecuador.

The petitioner also provided an organizational chart showing the beneficiary as the highest-ranking employee within the U.S. and foreign entities. In the U.S. entity, the beneficiary has two subordinate employees, including an office manager and a warehouse assistant. The petitioner indicated that it contracts third parties to maintain its fish tanks and to provide air freight and customs services.

On May 22, 2007, the director issued a notice, informing the petitioner that the evidence submitted thus far does not establish that the beneficiary's U.S. employment is in a qualifying managerial or executive capacity.

In response, the petitioner submitted a letter dated June 18, 2007 in which a number of documents were listed (and submitted) for the purpose of establishing the beneficiary's managerial or executive role within the U.S. entity. The supporting documents establish that the beneficiary has discretionary authority to make binding agreements on behalf of the petitioner and to act as the petitioner's representative when dealing with banking institutions, clients, and service providers. It is noted, however, that neither the beneficiary's rank within the petitioner's hierarchy nor his heightened degree of discretionary authority is sufficient to establish that his prospective employment will be within a qualifying managerial or executive capacity.

On August 17, 2007, the director denied the petition, finding that the petitioner has not established that it can relieve the beneficiary from having to spend the primary portion of his time performing non-qualifying job duties. The director specifically noted that the petitioner's Form I-140 indicates that the petitioner has no gross or net income.

On appeal, counsel asserts that the non-attorney individual who filled out the Form I-140 provided incorrect information about the petitioner's income. Counsel refers to the petitioner's partnership tax returns as proof that the information contained in the Form I-140 is inaccurate. While the additional documentation does indicate that the information provided in the Form I-140 with regard to the petitioner's gross and net income is inaccurate, the evidence of record does not corroborate counsel's claim as to the reason for the inaccuracy. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In the present matter, the Form I-140 is signed and dated by an individual whom the petitioner's organizational chart depicts as the office manager. Such signature certifies, under penalty of

perjury, that the information provided in the Form I-140 is true and correct. Despite counsel's claim that the petitioner was assisted by a third party in filling out the Form I-140, Part 9 of the petition does not contain the signature of an attorney or representative. However, even if the form were to have been completed by someone other than an employee of the petitioner, the individual signing on behalf of the petitioner as the petitioner's representative is under an obligation to ensure that the information provided is accurate. The fact that the petition was signed with the inaccurate information contained therein, suggests that it may contain other inaccurate information as well, causing the AAO to question the reliability of the petition as a whole.

Additionally, counsel asserts that the petitioner's use of independent contractors is built into its business plan. Counsel further explains that the beneficiary intended to use contract labor to relieve the petitioner of the cost of full-time employees. However, the record does not establish which duties were assigned to independent contractors, nor does the record contain documentation to establish the petitioner's use of independent contractors. While the AAO acknowledges that the primary concern is determining the beneficiary's proposed job duties, in order to determine that the beneficiary will be employed in a qualifying capacity, the petitioner must establish that it is able to relieve the beneficiary from having to primarily perform daily operational tasks. The lack of specific information regarding the petitioner's use of independent contractors precludes the AAO from being able to determine whether the petitioner has the capability to employ the beneficiary in a qualifying capacity.

Lastly, counsel contends that the job description attributed to the beneficiary is indicative of someone who handles the planning and growth of the company and while the beneficiary knows of the company's day-to-day activities, he is not the one responsible for performing them. Rather, counsel refers to other employees and indicates that they are the ones who perform the non-qualifying tasks on a daily basis. However, neither the evidence of record nor the beneficiary's job description supports counsel's statements. *See supra*. In the present matter, the petitioner provided a vague description primarily consisting of the beneficiary's job responsibilities, rather than the actual tasks the beneficiary would perform on a daily basis. 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. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Furthermore, a number of the responsibilities indicate that the beneficiary would perform daily operational tasks, including seeking new inventory and negotiating payment terms, soliciting new business and negotiating contract terms, preparing reports that the beneficiary himself would then analyze, and overseeing personnel whom the petitioner has not established as being supervisory, managerial, or professional employees. Although counsel refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Moreover, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all Citizenship and Immigration Services employees in the administration of the Act, unpublished decisions are not similarly binding. Furthermore, the referenced unpublished decision pertains to L-1 classification and not an offer of permanent employment.

Despite counsel's assertion that the beneficiary would not be responsible for day-to-day functions, there is little evidence that the petitioner has anyone but the beneficiary available to sell its inventory and deal with new and prospective clients, all of which are key to generating income. 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). The record in the present matter does not establish that the beneficiary would primarily perform duties within a qualifying managerial or executive capacity within the meaning of section 101(a)(44) of the Act. For this reason, the petition may not be approved.

Furthermore, the record does not support a finding of eligibility based on at least one additional ground that was not previously addressed in the director's decision. Specifically, 8 C.F.R. § 204.5(j)(3)(i)(B) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to his entry to the United States as a nonimmigrant to work for the same employer. In the instant matter, the petitioner provided a very general overview of the beneficiary's broad job responsibilities during his employment abroad. The AAO cannot make any conclusions as to the beneficiary's past job capacity based on the minimal information provided. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. As such, the petition must be denied for this additional reason.

Lastly, given the petitioner's description of its business organization and the beneficiary's proposed relationship to this business, it appears more likely than not that the beneficiary will not be an "employee" of the United States operation. As required by 8 C.F.R. § 204.5(j)(3)(C), the petitioner must establish that 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. *See* 8 C.F.R. § 204.5(j)(2) for definitions of *affiliate* and *subsidiary*. It is noted that "employer" and "employed" are not specifically defined for purposes of the Act even though these terms are used repeatedly in the context of addressing the current employment-based immigrant classification. However, section 101(a)(44), 8 U.S.C. § 1101(a)(44), defines both managerial and executive capacity as an assignment within an organization in which an "employee" performs certain enumerated qualifying duties.

Furthermore, the Supreme Court of the United States has determined that where a federal statute fails to clearly define the term "employee," courts should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as follows:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

*Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

Within the context of immigrant petitions seeking to classify the beneficiary as a multinational manager or executive, when a worker is also a partner, officer, member of a board of directors, or a major shareholder, the worker may only be defined as an "employee" if he or she is subject to the organization's "control." See *Clackamas*, 538 U.S. at 449-450; see also *New Compliance Manual* at § 2-III(A)(1)(d). Factors to be addressed in determining whether a worker, who is also an owner of the organization, is an employee include:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.
- Whether and, if so, to what extent the organization supervises the individual's work.
- Whether the individual reports to someone higher in the organization.
- Whether and, if so, to what extent the individual is able to influence the organization.
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
- Whether the individual shares in the profits, losses, and liabilities of the organization.

*Clackamas*, 538 U.S. at 449-450 (citing *New Compliance Manual*).

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that the beneficiary will be an "employee" employed in a managerial or executive capacity. The petitioner is a limited liability company, which is ultimately owned and controlled by the beneficiary, who purports to assume a role as the petitioner's principal. There is no evidence that any other individual has an ownership interest or is in a position to exercise any control over the work to be performed by the beneficiary.

In view of the above, it appears that the beneficiary will be a proprietor of this business and will not be an "employee" as defined above. It has not been established that the beneficiary will be "controlled" by the petitioner or that the beneficiary's employment could be terminated. To the contrary, the beneficiary *is* the petitioner for all practical purposes. He will control the organization; he cannot be fired; he will report to no one; he will set the rules governing his work; and he will share in all profits and losses. Therefore, based on the tests outlined above, the petitioner has not established that the beneficiary will be "employed" as an "employee."

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews

appeals on a *de novo* basis). Therefore, based on the additional grounds of ineligibility discussed above, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 not sustained that burden.

**ORDER:** The appeal is dismissed.