U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 0 1 2008

EAC 03 029 52410

IN RE: Petitioner: [redacted]
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:

[redacted]

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The appeal was ultimately dismissed. The matter is now before the AAO on motion to reopen and reconsider. The petitioner's motion to reopen will be dismissed due to the petitioner's failure to meet the requirements of 8 C.F.R. § 103.5(a)(2). The motion to reconsider will be granted and the information in counsel's appellate brief will be considered in a full discussion below. However, the underlying decision dismissing the appeal will be affirmed.

The petitioner is a New York corporation that claims to be engaged in the business of importing and exporting shrimp and fish. It seeks to employ the beneficiary as its president. 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 noting that documentation specifically pertaining to the U.S. entity, i.e., the petitioner's tax documentation and commercial lease, indicates that the petitioner was not able to employ the beneficiary in a qualifying managerial or executive position at the time the Form I-140 was filed.

Although counsel appealed the denial disputing the director's findings, the appellate brief he claimed would be submitted in support of the appeal was not in the record at the time of the AAO's initial review. Accordingly, the AAO summarily dismissed the appeal, pursuant to 8 C.F.R. § 103.3(a)(1)(v), which states that any appeal which fails to specifically identify any erroneous conclusion of law or fact shall be summarily dismissed.

On motion, counsel asserts that a brief had in fact been provided and resubmits the same for the record. The points made by counsel in the appellate brief will be fully addressed below.

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 petitioner established at the time of filing the Form I-140 that it was ready and able to employ the beneficiary in a 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. 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.

The record shows that the petitioner failed to comply with 8 C.F.R. § 204.5(j)(5), which requires that the petitioner furnish a job offer explaining fully the beneficiary's proposed job duties. Instead, the petitioner provided a letter dated October 7, 2002 from its attorney, who primarily focused on the foreign entity and stated only that the petitioner's purpose for transferring the beneficiary to work for the U.S. subsidiary was to fill the position of president, marketing and product development. The only other information with regard to the beneficiary's proposed position with the U.S. entity was contained in Part 6 of the Form I-140, where the beneficiary's non-technical job description was stated as "plan, develop and establish policies for [the] organization."

Accordingly, Citizenship and Immigration Services (CIS) issued two requests for additional evidence (RFE), the first on December 23, 2002 and the second on January 10, 2006.[1] In the second RFE, the director instructed the petitioner to provide an organizational chart reflecting the composition of the U.S. entity as of October 11, 2002 when the Form I-140 was filed. The petitioner was also asked to provide supporting evidence of its staffing structure, including various tax documents that establish the wages paid to employees as of the date of filing. Additionally, the director instructed the petitioner to provide documentation, including a commercial lease, to show its capability to conduct an import and export business, as well as further evidence to establish that the beneficiary would be employed in a managerial or executive capacity. The director expressly added that the response with regard to the beneficiary's job description must include specifics, rather than general responsibilities extracted from the regulations or from the *Department of Labor Occupational Outlook Handbook.*

In response, counsel submitted a letter dated April 6, 2006, listing the supporting documentation in the order of submission. With regard to the request for the U.S. entity's organizational chart, the petitioner provided a chart illustrating three tiers of management, including the president of the company at the top level of the organization, followed by a general manager at the next level, and a bookkeeper/accountant and an import manager at the lowest managerial tier. Both the general manager and import manager were shown to have a receptionist/secretary and an import clerk as their respective assistants. It is noted that the organizational chart contained no names of employees to show who was occupying the various positions. The petitioner did, however, provide two W-2 statements, one belonging to the beneficiary, showing earnings of $50,000 during 2002, and the other belonging to [redacted], showing earnings of $1,950 during 2002. The petitioner did not clarify which position [redacted] occupied or specify his hiring date. As such, there is no explanation as to the duties performed by this individual, nor can it be determined that this individual was employed by the petitioner at the time the Form I-140 was filed. That being said, even if the AAO were to assume that Mr. [redacted] was hired at or around the time the Form I-140 was filed and continued to work for the petitioner throughout the remainder of 2002, the salary indicated in [redacted]'s W-2 is not commensurate with that of a full-time employee, thereby indicating that the petitioner's entire staff at the time of filing was comprised of no more than one full-time employee, i.e., the beneficiary, and one part-time employee.

Although the petitioner was also asked to provide a detailed description of the beneficiary's proposed employment, counsel's response included only a brief statement, indicating that the beneficiary "negotiates and oversees all the contracts and agreements between [the petitioner] and its overseas clients. He is in charge of all hiring and firing of personnel. He also is in charge of establishing new U[.]S[.] clients." No further explanation was provided to clarify how, if at all, the petitioner was able to relieve the beneficiary

[1] *See* page one of the director's decision dated May 22, 2006 for a full explanation of the basis for issuing the second RFE.

from having to primarily perform non-qualifying operational tasks, particularly given the petitioner's staffing structure at the time the Form I-140 was filed.

Pursuant to a review of the submitted documents, the director issued a decision dated May 22, 2006, denying the petitioner's Form I-140 on the basis that the petitioner failed to establish its ability to employ the beneficiary in a qualifying managerial or executive capacity as of the filing date of the petition.

On appeal, counsel for the applicant contends that it is unreasonable for CIS to expect the petitioner to hire additional personnel after having denied the petition that would have allowed the beneficiary to remain in the United States and continue developing the business. Contrary to counsel's reasoning, however, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Thus, precedent case law establishes that counsel's argument is entirely without merit, as it is based on the illogical assumption that a beneficiary may be granted permission to remain in the United States regardless of whether the petitioner has established its statutory eligibility to employ the beneficiary as president of the U.S. entity.

Furthermore, counsel expresses his utter shock at the fact that the petitioner is expected to hire additional personnel when the Form I-140 has been denied. However, this argument further suggests counsel's failure to understand that eligibility must be established at the time the Form I-140 is filed. Counsel misinterprets the director's underlying explanation for denying the petition for a list of expectations the petitioner must meet in order to establish eligibility. This is not the case. A thorough review of the director's decision, in light of relevant legal provisions that have been established by statute, regulation, and case law, indicates that any hiring the beneficiary would have done after the petitioner had filed the Form I-140 would be irrelevant for the purpose of establishing the petitioner's eligibility for the benefit sought in the present matter. The fact that the petitioner's hiring capabilities are limited to employment of a very limited support staff, which essentially consists of the beneficiary, is a strong indication that the beneficiary would not be primarily carrying out duties that are managerial or executive. Rather, the beneficiary would be responsible for all types of job duties, including daily operational tasks, that would be required to produce a product or provide a service. It is noted, however, that 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).

In summary, when examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the present matter, the petitioner has failed to provide this crucial information, despite the director's prior express request, and instead, has provided brief statements from counsel generalizing the beneficiary's overall job responsibilities without any indication as to how the beneficiary would primarily perform qualifying job duties given the petitioner's particular staffing structure at the time the petition was filed. That being said, even though a specific job description has not been provided, the fact that the petitioner's staffing is primarily limited to the beneficiary as the only full-time employee indicates that the beneficiary would likely spend the majority of his time performing functional tasks that are necessary for the petitioner's daily operation. In light of these adverse findings, the AAO cannot conclude that the petitioner established at the time of filing the Form I-140 that it had the ability to primarily employ the beneficiary as a managerial or executive employee.

Additionally, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision.

First, 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 has stressed that the beneficiary was the owner of the foreign entity, relying on this fact as an indication of the beneficiary's employment capacity abroad. However, in order to determine employment capacity, the petitioner must provide a description of the beneficiary's job duties, as it is the actual duties themselves that reveal the true nature of the employment. *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). Without this necessary information, the AAO cannot conclude that the petitioner has successfully established that the beneficiary was employed abroad in a qualifying capacity for the requisite time period.

Second, 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." As the Form I-140 in the present matter was filed in October 2002, the petitioner must establish that it had been doing business for one year prior to that date. However, the invoices submitted by the petitioner only establish that the foreign entity has been doing business. There is no documentation that would establish that the U.S. entity has been engaged in import and/or export transactions on a regular, systematic, and continuous basis.

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 would 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.

Darden, 503 U.S. at 323-324; *see also Restatement (Second) of Agency* § 220(2) (1958); *Clackamas 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 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. As explained above, the petitioner is a corporation, which the petitioner claims 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" and the petition may not be approved for this and the other additional reasons discussed above.

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 ground of ineligibility as cited 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 she shows that the AAO abused it discretion with respect to all of the AAO's enumerated grounds. *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).

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 dismissal of the appeal is affirmed.