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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] OFFICE: NEBRASKA SERVICE CENTER Date: DEC 02 2008

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IN RE: Petitioner:
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:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska 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 engaged in the business of offering courses and seminars on speed-reading. 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 on the basis of three adverse findings: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; and 3) the petitioner failed to establish an ability to pay the beneficiary's proffered wage.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his arguments. A full discussion of the director's findings and counsel's response on appeal will be provided 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 first two issues in this proceeding call for an analysis of the beneficiary's job duties during his employment abroad as well as his proposed job duties in his prospective position with the U.S. petitioner.

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's senior vice president of marketing and public relations submitted an affidavit in which she stated that the beneficiary has discretionary authority with respect to contract negotiation, seminar scheduling, marketing and advertisement, and implementing new policies and procedures. Additionally, she included the following statements describing the beneficiary's proposed employment:

- Directing and coordinating all major functions/components of the organization[,] including sales, management, marketing, personnel, and administration;

Establishing goals and objectives of the organization[,] including sales and marketing projections, forecasts, and revenue predictions;

- Negotiating all contracts with existing clientele and new clientele alike;

Conducting corporate seminars at locations throughout the United States;

Developing and implementing a procedure for the hiring, training, and evaluation of new employees; and

- Exercising discretionary authority with respect to the above duties.

No information was provided with regard to the beneficiary's employment abroad.

On August 23, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide documentation to assist Citizenship and Immigration Services (USCIS) in determining the beneficiary's employment capacity in his overseas position and in his proposed position with the U.S. entity. Specifically, the petitioner was instructed to provide statements describing the beneficiary's foreign and proposed job duties on a daily basis and each entity's organizational chart illustrating the beneficiary's position with respect to others within the respective entity's hierarchy. The director also asked the petitioner to explain what specific duties are entailed in conducting seminars, a responsibility that was attributed to the beneficiary's position with the U.S. entity.

In response, counsel provided an undated letter, signed by both counsel and the petitioner, addressing the director's concerns. Counsel did not specify whether the beneficiary's employment was within a managerial or executive capacity, but rather referred to the beneficiary's position title and stated that the beneficiary's duties were "managerial/executive." Counsel included the following description of the beneficiary's employment abroad in the position of managing director/president:

(a) [D]eveloping and implementing policies and procedures for sales, marketing, and all aspects of the organization; (30%)

(b) [H]iring all employees of the corporation to ensure its efficient operation; (10%)

(c) [E]stablishing organization policies and procedures with respect to sales, marketing, inventory and purchasing (see above);

(d) [O]verseeing the marketing plan for [the foreign entity]; (10%)

(e) [D]eveloping and implementing the sales and managerial staff of the organization (10%);

(f) [D]irecting and coordinating the activities of all subordinate personnel, department heads, instructors, and new employees (25%);

(g) [C]ontract negotiations, overseeing all seminars, programs, and conferences for [the foreign entity] (15%).

With regard to the beneficiary's proposed U.S. employment, counsel restated the first five responsibilities that were initially provided by the petitioner and assigned a percentage breakdown indicating that 40%, 30%, 10%, 15%, and 5% would be allotted to each of the five responsibilities, respectively. Counsel reiterated the prior claim that the beneficiary would continue to exercise discretionary authority with respect to all of his assigned responsibilities. With regard to the beneficiary's responsibility of conducting seminars, counsel explained that the beneficiary negotiates with vendors and makes final decisions regarding costs, locations, pricing, and duration of the seminars. With regard to contract negotiations, counsel explained that the beneficiary identifies all prospective clients. The beneficiary then determines which vendors will be utilized, and specifies the type of services to be rendered to the client, the length and location of services, and the instructional materials to be offered.

With regard to the director's request for organizational charts illustrating the hierarchies of the foreign and U.S. entities, counsel stated that both charts were submitted as part of Exhibit A in response to the RFE. However, the AAO's page-by-page review of the petitioner's entire record of proceeding was fruitless in locating the necessary documentation. To confuse matters further, counsel submitted a master exhibit list enumerating each document that was being submitted in response to the RFE. It is noted that Exhibit A is listed as containing the RFE and Exhibit B is listed as containing the response to the RFE. That being said, the petitioner provided a list of contractors and their geographic locations, stating that these individuals report directly to the petitioner's vice president. The petitioner further stated that these individuals are responsible for commencing contract negotiations with prospective clients and vendors.

Additionally, the record shows photocopies of various documents that the petitioner submitted in support of a previously filed Form I-129 L-1A nonimmigrant petition. Such documents include an organizational chart of the U.S. petitioner as of February 12, 2003 and a separate organizational chart that appears to represent the hierarchical structures of two affiliate foreign entities, [redacted] and [redacted] both of which are shown as being owned by the beneficiary and his wife. The organizational chart that represented the U.S. entity identified the beneficiary as the corporate development manager with seven subordinates, including an accountant, a web consultant, a computer consultant, three operations managers in three different regions within the United States, and the beneficiary's wife as the marketing director, who is shown as having three subordinates, including a public relations employee, a marketing/advertising employee, and a marketing/promotions employee. It is noted that only one of the operations managers' positions appears to have been filled as of the date on the chart, as only one position was qualified with the name of an employee. Despite the director's specific request, the petitioner has not provided a more recent block organizational chart for the U.S. entity, thereby precluding USCIS from being able to determine whether additional employees were hired since February 2003. It is noted that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The other organizational chart noted above shows two foreign entities with different hierarchies. The hierarchy of [redacted] is significantly more complex, depicting the beneficiary and his wife as managing directors. The beneficiary's direct subordinate is shown to be a vice president of the South African Operations. Her immediate subordinates include three instructors and an administrative assistant. The second entity shows the beneficiary, his wife, and an office manager as the company's only employees. Since the chart shows the beneficiary and his wife as being currently located in the United States, it appears that the office manager is currently the sole remaining employee at [redacted].

After reviewing the petitioner's submissions, the director issued a decision dated January 9, 2008 denying the petition. The director acknowledged the similarities between the nonimmigrant L-1A visa classification and the immigrant multinational manager or executive visa classification, and pointed out that there are differences that may lead to denial of the immigrant petition even when the nonimmigrant petition(s) was approved. The director went on to scrutinize one of the above described organizational charts, as no chart had been submitted directly in response to the RFE, and went on to note that the petitioner failed to clarify whether the list of employees submitted in response to the RFE represented the foreign or U.S. entity. Ultimately, with regard to the beneficiary's foreign employment, the director found that the job description failed to clarify the specific daily job duties that were performed. With regard to the beneficiary's proposed employment, the director found that the petitioner failed to establish who would perform the daily operational tasks such that the beneficiary would be relieved from having to do so. While the AAO does not agree with the director's affirmative finding, that the primary portion of the beneficiary's time would be spent performing daily operational tasks, the AAO finds the record to be lacking an adequate description of the beneficiary's job duties and further finds that the petitioner failed to provide sufficient evidence establishing that it was ready and able to relieve the beneficiary from having to primarily perform non-qualifying tasks on a daily basis at the time the Form I-140 was filed.

On appeal, counsel first points to USCIS's prior approvals of the petitioner's L-1A employment of the beneficiary in the same capacity as what is proposed in the current petition. This argument, however, was previously addressed and rejected by the director and will be rejected again on appeal, as it is not persuasive. First, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. USCIS is not required to assume the burden of searching through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand. In the present matter, the petitioner has provided copies of various documents previously submitted with regard to issues that arose from the petitioner's latest filing of the Form I-129 to extend the petitioner's employment of the beneficiary in the L-1A visa category. It is noted that the AAO has reviewed these documents and finds that the submissions do not establish that the beneficiary's employment with the petitioning organization has been within a qualifying managerial or executive capacity. The AAO has already discussed the petitioner's outdated organizational chart and found that this document does not establish the petitioner's eligibility. While the petitioner also provided a copy of the letter that was submitted in support of the prior L-1A petition, the beneficiary's employment is described using the same inadequate terminology as has been used in the current filing. Thus, if the prior L-1A petition had been approved on the basis of the documents that are currently before the AAO, such approval would have been material and gross error on the part of the director and would therefore be currently subject to revocation. 8 C.F.R. § 214.2(l)(9)(iii)(A)(5).

Second, the approval of a nonimmigrant petition, or even multiple petitions as in the petitioner's case, in no way guarantees that USCIS will approve an immigrant petition filed on behalf of the same beneficiary. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). That being said, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Therefore, for the reasons stated above, the prior approvals of the petitioner's prior nonimmigrant petitions will not guide the outcome in the present matter.

Next, counsel focuses on the director's finding that the evidence of record indicates that the beneficiary would primarily perform the petitioner's daily operational tasks. While the AAO concludes that the record does not support the director's affirmative finding, it nevertheless maintains its affirmation of the director's denial. More simply stated, the director's affirmative finding suggests that the record has sufficient documentation to formulate a basis upon which to make an informed determination as to the job duties the beneficiary performs daily. The AAO, however, finds that the record does not contain the necessary job description upon which the director could have based his finding. To the contrary, the AAO finds that the job descriptions provided by the petitioner and by counsel are replete with vague terminology, which, while suggestive of a managerial or executive capacity employee, does not define the specific tasks that have been and would be performed on a daily basis. It is noted that reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. *See* 8 C.F.R. § 204.5(j)(5). Case law supports USCIS's emphasis on daily tasks, finding that the actual duties themselves 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).

In the present matter, the job descriptions attributed to the beneficiary's employment lack the necessary details that would reveal with any degree of certainty what job duties the beneficiary performed during his employment abroad and what job duties he would perform during his employment in the United States. For instance, with regard to the beneficiary's foreign employment, the petitioner previously stated that 30% of the beneficiary's time would be allotted to developing and implementing policies and procedures for sales and marketing. However, the petitioner provided no information as to the types of policies and procedures referenced or the specific tasks involved in developing and implementing the policies and procedures; nor did the petitioner explain who within the organization was responsible for the sales and marketing tasks.

The petitioner further stated that 10% of the beneficiary's time was allotted to hiring employees, thereby suggesting that this type of human resource issue is something that was dealt with regularly rather than sporadically on a need basis. However, there is no documentation to support that new employees were regularly hired on a weekly or even monthly basis. Although the job description indicated that another 15% of the beneficiary's time was spent overseeing seminars, programs, and conferences, the petitioner failed to define the beneficiary's specific job duties in relation to such oversight. It is unclear whether the beneficiary was overseeing these events while others were actually conducting them or whether the beneficiary's oversight included his direct involvement in conducting the events, which would suggest the performance of non-qualifying daily operational tasks. When reviewed comprehensively, this breakdown suggests that at least 55% of the beneficiary's time has not been attributed to specific tasks, thereby increasing the likelihood that the beneficiary spent the primary portion of his time performing tasks of a non-qualifying nature.

Similarly, with regard to the beneficiary's proposed employment, the petitioner attributed 40% of the beneficiary's time to directing and coordinating all major functions. However, broad terms like directing and coordinating must be defined with more specific job duties. In other words, how was the beneficiary carrying out these broad job responsibilities? The petitioner attributed another 30% of the beneficiary's time to establishing goals and objectives. Again, the petitioner provided no further information to explain which goals and objectives the beneficiary would be in charge of establishing and who specifically would carry them out once they have been established. Thus, at least 70% of the beneficiary's time has been attributed to

undefined job duties. The petitioner cannot expect the AAO to determine the nature of job duties which it has failed to reveal. Thus, with regard to the beneficiary's foreign and proposed employment, the petitioner has neglected to convey a meaningful understanding of the tasks performed and to be performed on a daily basis. Without this fundamental information, the AAO cannot conclude that the beneficiary was employed abroad and that he would be employed in the United States in a qualifying managerial or executive capacity.

Counsel further notes that the director failed to address an updated list of individuals who are claimed to be part of the beneficiary's organization. While this may be true, the AAO must note that the petitioner presented the list without providing an adequate discussion as to which entity, i.e., the U.S petitioner or the beneficiary's foreign employer, employs the individuals that were listed. While some individuals are associated with regions within the United States, others are associated with other countries. It is unclear where these alleged employees are located, what specific functions they carry out, and who oversees the tasks that they perform. Furthermore, the petitioner provided no documentation to establish its own employment of these individuals. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Thus, in light of the lack of information provided by the petitioner, counsel's argument is simply baseless. While the petitioner has submitted an organizational chart in support of the appeal, it is noted that the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. As the petitioner failed to submit the requested evidence, the AAO will not consider the newly submitted evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

In summary, the record as constituted at the time of the director's review did not warrant approval of the petition. As discussed above, the petitioner failed to provide adequate job descriptions for the beneficiary's foreign and proposed positions, nor did the petitioner illustrate organizational hierarchies with adequate support personnel capable of relieving the beneficiary from having to primarily perform either operation's daily operational tasks. In light of these findings, the AAO cannot conclude that the petitioner established its eligibility to classify the beneficiary as a multinational manager or executive. On this initial basis, the AAO cannot instruct the director to approve the petitioner's Form I-140.

The third issue that was addressed in the director's decision is whether the petitioner has the ability to pay the beneficiary's proffered wage.

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

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the present matter, the petitioner indicated at Part 6, No. 9 of the Form I-140 that the beneficiary would be compensated $60,000 annually under an approved petition. Although the petitioner is not required to compensate the beneficiary the proffered wage prior to the petition's approval, the regulatory provisions above are clear in requiring the petitioner to establish the ability to pay the proffered wage at the time the Form I-140 is filed. *Id.* It stands to reason that the petitioner's ability to pay is assumed if the petitioner provides documentation showing that the beneficiary is actually getting compensated the proffered wage at the time of filing. In the present matter, the petitioner provided the beneficiary's Form 1040, joint tax return for 2006 for the beneficiary and his wife, showing that their total income earned for the year prior to the filing of the petition was $36,368, an amount that falls far short of the proffered wage.

Therefore, USCIS may examine the net income figure reflected on the petitioner's federal income tax return, without considering depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). If the net income the petitioner demonstrates it had available during the pertinent period added to the wages paid to the beneficiary during the period do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets.

In the present matter, the petitioner filed the Form I-140 on March 26, 2007, while the petitioner's most current tax return on record is for 2006. Thus, even if the 2006 tax return showed that the beneficiary was receiving the proffered wage in 2006, USCIS could not rely on the outdated document to establish whether the petitioner had the ability to pay the beneficiary's proffered wage in 2007.

That being said, the petitioner's 2006 tax return does not establish its ability to pay the beneficiary's proffered wage of $60,000 per year. First, the petitioner's net income for 2006 was only $2 and thus was not sufficient to establish the ability to pay. Second, a review of the petitioner's net current assets, i.e., the difference between its current assets and current liabilities, shows that the latter (the sum of schedule L, lines 16-18) is equal to $57,993, which is greater than the petitioner's net current assets (the sum of schedule L, lines 1-6), which is equal to $20,975. Thus, even if the petitioner's prior tax returns were relevant, they fail to establish the company's ability to compensate the beneficiary's proffered wage. As such, the AAO cannot conclude that the petitioner met the requirements of 8 C.F.R. § 204.5(g)(2) at the time of filing. For this additional reason, this petition cannot be approved.

Furthermore, 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)(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." In the present matter, the petitioner describes itself as a service provider. More specifically, the petitioner claims that it generates income by providing speed reading courses and seminars to various clients. While the petitioner has provided its 2006 tax return showing gross receipts and sales totaling $181,511, this document is insufficient to enable the AAO to conclude that the income was generated through the provision of services on a "regular, systematic, and continuous" basis for the

immediate prior year. *See id.* The petitioner provided no invoices or receipts showing that it was rendering its services in the manner prescribed by regulation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Therefore, the petitioner has failed to establish that it meets the requirements of 8 C.F.R. § 204.5(j)(3)(i)(D).

Second, 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.

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 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 corporation, which is ultimately owned and controlled by the beneficiary and his wife, with the beneficiary assuming a role as the petitioner's principal. There is no evidence that any other individual has 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.