U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: APR 03 2009
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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 petitioner filed a motion to reopen and reconsider seeking to overcome the director's findings. The director granted the motion, but affirmed the denial of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Florida corporation seeking 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's initial denial of the petition was based on two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity. In support of his conclusion, the director provided a discussion of the findings that resulted in the denial of the petition, focusing heavily on the petitioner's failure to provide a detailed description of the beneficiary's job duties.

On motion, counsel addressed the director's findings, providing an overview of the foreign entity's staffing and each staff member's responsibilities. Counsel also disputed the director's findings with regard to the beneficiary's employment capacity in his proposed position with the U.S. entity, asserting that the evidence and information previously submitted established that the petitioner had and would continue to employ the beneficiary in an executive capacity.

The director granted the motion and reviewed the record a second time. Although the language of the decision is somewhat ambiguous, it appears that the director's most recent adverse decision was based solely on the finding concerning the beneficiary's proposed position within the U.S. entity. It appears that the director withdrew the earlier finding that the beneficiary was not employed abroad in a qualifying capacity. After thoroughly reviewing the record, the AAO affirms the most recent decision, which cited the beneficiary's proposed employment and excluded his foreign employment as a basis for denial.

On appeal, counsel asserts that the director failed to give proper consideration to the two prior nonimmigrant petition approvals for the same beneficiary. Counsel also provides the Department of Labor's descriptions for each of the positions listed within the petitioner's organizational hierarchy, contending that the petitioner is a professional organization that is in need of the beneficiary's leadership and direction in all business matters.

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 calls for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the beneficiary would be employed in the United States in a qualifying 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.

In support of the Form I-140, the petitioner provided a letter dated April 5, 2007, which contained the following percentage breakdown describing the beneficiary's proposed employment:

- Plan, develop, and establish policies and objectives of [the] U[.]S[.] business. (10%)
- Plan business objectives[,] develop organizational policies to coordinate function and operation, and establish responsibilities and procedures for attaining objectives. (10%)
- Review activity reports and financial statements to determine progress and status in attaining objectives. (15%)
- Revise objectives and plans in accordance with current conditions. (10%)
- Direct and coordinate formulation of financial programs to provide funding for new or continuing operations to maximize return on investment[s], and to increase productivity. (10%)
- Determine and implement marketing and sales strategies. (15%)
- Plan and develop policies designed to improve [the] company's image and relations with customers, employees, and [the] public. (10%)
- Hire personnel and evaluate performance for compliance with established policies and objectives of [the] firm and contributions in attaining objectives. (10%)
- Ensure smooth delivery of [the] product to clients and client satisfaction. (10%)

In response to the director's May 10, 2007 request for additional evidence (RFE), counsel provided a letter dated July 6, 2007 in which she listed the four employees and the five subcontractors that the beneficiary currently supervises. The petitioner also provided its organizational chart, showing each employee's and subcontractor's position within the U.S. entity's hierarchy and illustrating each individual's position with respect to the beneficiary. The chart shows that the beneficiary's two direct subordinates include the secretary/company accounts and director of sales and marketing. The chart also shows that the director of sales and marketing oversees the property manager/sales associate and interior designer/installation manager and that the secretary/company accounts position oversees the firm contracted to perform the petitioner's accounting services. Lastly, the chart shows that the company's property manager/sales associate oversees a subcontracted cleaning company, while the interior designer/installation manager oversees subcontracted soft furnishings installers, tile and carpet installers, and subcontracted carpentry and installation services.

In the initial denial, dated July 25, 2007, the director found that the description of the beneficiary's proposed position lacked sufficient detail and in general provided little insight into the beneficiary's day-to-day job duties.

On motion, counsel reiterated the beneficiary's position description and listed the position titles within the petitioner's organizational chart, disputing the director's finding that the previously provided description of the beneficiary's proposed employment was deficient. In an effort to overcome this finding, the petitioner provided a log of tasks the beneficiary carried out during the one-week period from July 30, 2007 through August 3, 2007. The AAO notes, however, that 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). In the present matter, the Form I-140 was filed in April 2007. It is not clear that the task log is an accurate portrayal of the job duties the beneficiary would have performed at the time of filing.

Additionally, even if the task log is an accurate representation of the duties performed at the time of filing, it does not establish that the beneficiary would be employed in a qualifying capacity under an approved petition. The task log provides only a general overview of the proposed employment. In fact, with the exception of the Thursday task log, each day is divided into a morning and afternoon portion with each morning entailing a meeting between the beneficiary and either a company employee, a subcontractor, or a company client. The afternoon portion of the beneficiary's day appears to include similar meetings with other company employees or subcontractors. For instance, Monday's morning activity consisted of meeting with the managing director of Lifestyle Magic Incorporated to discuss the petitioner's association with properties managed by the latter entity. In light of the petitioner's description of the beneficiary's morning tasks, it appears that the meeting was arranged for the purpose of soliciting further business for the petitioner. It is therefore unclear how the business meeting can be classified as a qualifying task as it was meant to sell the petitioner's services. As the beneficiary's afternoon was entirely consumed with making plans to address the morning meeting, it is equally unclear how those tasks could have been qualifying. Similarly, the beneficiary's time spent meeting with the petitioner's new clients, which accounted for the beneficiary's Friday morning activity, also cannot readily be identified as a qualifying task(s) without further explanation.

Further, the task log for Tuesday and Wednesday of that week indicates that at least a portion of the beneficiary's time was spent meeting with the interior designer, despite the fact that the petitioner's organizational chart clearly shows another employee, i.e., the real estate broker/sales and marketing manager, as the interior designer's direct supervisor. It is unclear how the time spent meeting with the interior designer can be deemed as a qualifying task, nor has the petitioner provided sufficient information to indicate just how much of the beneficiary's time is allotted specifically to non-qualifying job duties. While the AAO acknowledges that a multinational manager or executive may have a mix of job duties, including those that are non-qualifying, the petitioner must establish that a majority of the beneficiary's time is allotted to qualifying tasks. It is noted 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). The task log that has been provided by the petitioner does not establish that the beneficiary's time would be primarily devoted to tasks within a qualifying capacity.

On appeal from the director's most recent decision, counsel asserts that the director erroneously applied the statutory definition of managerial capacity, despite the fact that the petitioner's claim is that the beneficiary would be employed in an executive capacity. After reviewing the director's latest decision, the AAO finds that counsel's objection is without merit. Contrary to counsel's argument, the director cited portions of the statutory definition of managerial capacity as well as portions of the definition of executive capacity, thereby indicating that both statutory definitions were applied to the description of the beneficiary's proposed employment. The AAO notes that this is the general practice of U.S. Citizenship and Immigration Services (USCIS). Despite counsel's objection, the purpose of this practice is to allow the petitioner the added benefit of qualifying under either statutory definition, even if the beneficiary's employment falls under a statutory definition other than the one initially claimed. There is no indication, as suggested by counsel, that the director ignored the petitioner's initial claim, as the director clearly concluded that "[t]he record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization."

Counsel also continues to express her dismay at the fact that the petitioner's Form I-140 was denied despite the two prior approvals of the petitioner's L-1A nonimmigrant petitions for the same beneficiary. Although counsel acknowledges the explanations provided by the AAO in other decisions dealing with the same issue, she nevertheless finds these explanations inadequate. First, counsel questions the likelihood that service centers give less scrutiny to nonimmigrant L-1A petitions than they do to immigrant petitions. Counsel refers to a report from the Inspector General cautioning of abuses of the L-1 visa program, suggesting that the report would cause service centers to scrutinize nonimmigrant petitions more, rather than less, closely than their immigrant counterparts. Next, counsel argues that the AAO's distinction of the immigrant Form I-140 petitions from the nonimmigrant Form I-129L petitions suggests that the former are held to a higher standard than the latter petitions. These suspicions, however, are unfounded and merely represent counsel's subjective interpretation, which is not supported by independent objective evidence. *See Matter of Obaigbena*, 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).

Furthermore, with regard to the critique of the AAO and the suggestion that a higher standard is applied when reviewing immigrant petitions, counsel's comments indicate that she has taken the AAO's statements out of context. Contrary to counsel's assertions, the AAO does not suggest that the less permanent nature of the nonimmigrant petition causes less scrutiny of those petitions, which ultimately leads to erroneous approvals. Rather, the AAO makes two independent statements in its explanation. First, the AAO distinguishes the immigrant versus the nonimmigrant petitions, citing the permanent nature of the former versus the temporary nature of the latter as one of those distinctions. Second, the AAO notes that certain types of L-1A petitions, particularly extension petitions for petitioners that do not fall under the definition of "new office," may be approved without any supporting documentation, which may account for many of the erroneous approvals. *See* 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity). There is no indication in the explanation offered by the AAO that less scrutiny is given to L-1A petitions as a result of their temporary nature. Thus, the AAO finds counsel's criticisms to be entirely without merit.

As properly determined by the director in his prior decisions, the petitioner has provided a deficient description of the beneficiary's job duties, failing to convey a meaningful understanding of the specific tasks the beneficiary would perform on a day-to-day basis and without a foundation upon which to conclude that the primary portion of the beneficiary's time would be spent performing tasks within a qualifying managerial or executive capacity. *See* 8 C.F.R. § 204.5(j)(5). 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). Here, the record is devoid of these necessary specifics.

Furthermore, while the director made no specific request for evidence of the personnel employed by the petitioner at the time the Form I-140 was filed, the AAO notes that the petitioner is nevertheless obligated to provide documentary evidence to support its assertions, including the assertions regarding the personnel composition as conveyed in the petitioner's organizational chart. As previously stated, 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. at 165. It is further noted that in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003).

Accordingly, due to the petitioner's failure to meet the requirement set out in 8 C.F.R. § 204.5(j)(5) and its failure to establish that it had sufficient personnel at the time of filing to relieve the beneficiary from primarily performing non-qualifying tasks, the AAO cannot conclude that the beneficiary would be employed in a qualifying managerial or executive capacity under an approved petition. For this reason, the 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)(C) states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

> *Affiliate* means:
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> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
>
> (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;
>
> * * *
>
> *Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.
>
> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In the present matter, the petitioner claims and provides evidence to show that it is owned 50/50 by the beneficiary and his wife. Although the petitioner claims to have an affiliate relationship with the foreign entity by virtue of being partly owned by the beneficiary and his wife, there is no evidence establishing the degree of common ownership. The above definition of affiliate sets out specific criteria for meeting the definition of an affiliate. Merely having some degree of common ownership does not necessarily mean that the regulatory criteria have been met. In the present matter, these criteria can only be met if the foreign entity is owned 50/50 by the beneficiary and his wife, as they are the two individuals who own and control the U.S. petitioner. Here, there is no evidence establishing such an ownership scheme of the foreign entity. As previously stated, the petitioner

must provide independent evidence to corroborate its claims. *See Matter of Soffici*, 22 I&N Dec. at 165. As such, the AAO cannot conclude that a qualifying relationship exists between the petitioner and the beneficiary's employer abroad.

Lastly, by virtue of the beneficiary's claimed ownership of the U.S. petitioner, it appears more likely than not that the beneficiary will not be an "employee" of the United States operation. As explained in 8 C.F.R. § 204.5(j)(5), the petitioner must establish that the beneficiary will be "employed" in an executive or managerial capacity. It is noted that "employer," "employee," and "employed" are not specifically defined for purposes of the Act even though these terms are used repeatedly in the context of addressing the multinational executive and managerial immigrant classification. Section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C), requires beneficiaries to have been "employed" abroad and to render services to the same "employer" in the United States. Further, 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. Finally, the specific definition of "managerial capacity" in section 101(a)(44)(A), 8 U.S.C. § 1101(a)(44)(A), refers repeatedly to the supervision and control of other "employees." Neither the legacy Immigration and Naturalization Service nor USCIS has defined the terms "employee," "employer," or "employed" by regulation for purposes of the multinational executive and managerial immigration classification. *See, e.g.,* 8 C.F.R. § 204.5 and 8 C.F.R. § 214.2(l). Therefore, for purposes of this immigrant classification, these terms are undefined.

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 Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 449-450 (2003); *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 beneficiary's work will be subject control. Therefore, the AAO cannot conclude that the beneficiary will be an employee of the petitioning entity as required by 8 C.F.R. § 204.5(j)(5).

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 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 appeal is dismissed.