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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE: [redacted] OFFICE: NEBRASKA SERVICE CENTER Date: JUL 08 2009

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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.

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 New York corporation that seeks to employ the beneficiary as its president/chief executive officer.[1] 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 based on the conclusion that the beneficiary would not be an "employee" of the petitioning entity.

On appeal, counsel disputes the director's findings and submits a brief in support of his arguments. A full discussion of the petitioner's submissions and the director's analysis 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.

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[1] It is noted that in the petitioner's support letter, dated April 27, 2007, the petitioner describes itself as a New Jersey corporation. However, the supporting documents, including the stock certificate issued by the petitioner as well as the document entitled "Certificate of Incorporation" both identify the petitioner as a New York corporation.

The primary issue in this proceeding is whether the beneficiary will be an employee of the petitioning entity.

In a letter dated April 27, 2007, the petitioner claimed that the beneficiary owns 95% of the foreign entity, which owns 100% of the U.S. entity. In support of this claim, the petitioner provided the foreign entity's articles of association, published in a Turkish publication entitled *Turkish Trade Register Gazette* (December 2, 1992), in which Article 6 states that the beneficiary funded 80% of the foreign entity by providing 80 million of a total 100 million Turkish Liras. The petitioner also provided an amendment to the foreign entity's capital structure, also published in the *Turkish Trade Register Gazette* (July 3, 2003), which shows a board of shareholders resolution to increase the amount of capital to 250 billion Turkish Liras. Of the 250 billion Turkish Liras, the beneficiary contributed 237 billion Turkish Liras, thereby giving him ownership of a total of 95% of the foreign entity's shares. In light of the beneficiary's ownership interest in the petitioning entity at the time of filing, the director was led to question whether there is an actual employer-employee relationship between the petitioner and the beneficiary. If there is no employer-employee relationship, then the beneficiary's services will not satisfy the statutory definition of managerial or executive capacity.

In a June 9, 2008 notice, the director requested that the petitioner provide additional evidence establishing who controls the U.S. entity and who shares in its profits and losses. The director also asked the petitioner to provide evidence establishing that the foreign entity paid for its interest in the U.S. petitioner.

In response, the petitioner resubmitted a copy of the publication memorializing the amendment to the foreign entity's capital contribution. No new evidence was submitted to address the director's concerns specifically regarding the U.S. entity's ownership. The submitted document also fails to address the issue of who shares in the profits and losses of the U.S. entity.

On July 30, 2008, the director issued a notice denying the petition on the basis of the finding that the beneficiary ultimately owns and controls the U.S. petitioner and therefore is not truly an employee of a U.S. employer as statutorily required. *See* section 203(b)(1)(C) of the Act.

On appeal, counsel submits a letter dated August 20, 2008 in which he disputes the director's decision, asserting that the petitioner has been identified as an employer in the Form I-129 nonimmigrant petition as well as the Form I-140 immigrant petition. Counsel argues that the petitioner repeatedly holds itself out as the beneficiary's employer in various tax documents and in company support letters, suggesting that the employer/employee relationship is primarily based on the beneficiary's perception and the fact that the U.S. entity pays the beneficiary's wages. Counsel introduces several unpublished AAO decisions in support of his arguments. However, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all U.S. Citizenship and Immigration Services (USCIS) employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel also argues that the director's reasoning is contrary to existing case law precedent, citing *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980) (hereinafter *Aphrodite*) and *Matter of M--*, 8 I&N Dec. 24 (BIA 1958) in support thereof.

In *Matter of Aphrodite*, the Immigration and Naturalization Service (INS) Commissioner addressed whether a petitioner may seek to classify a beneficiary as an intracompany transferee even though the beneficiary was a part owner of the foreign entity and, apparently, not an "employee" of either the foreign entity or the petitioner. The district director and regional commissioner had determined that the beneficiary could not be classified as an intracompany transferee because "he is 'an entrepreneur, a speculative investor, and not an employee of an international company.'" 17 I&N Dec. at 530. Relying on *Matter of M--*, the Commissioner disagreed, declined to require that intracompany transferees be "employees," and specifically noted that the word "employee" is not used in section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). 17 I&N Dec. at 531. The Commissioner further reasoned that adopting the word "employee" would exclude "some of the very people that the statute intends to benefit: executives" and noted that the *Webster's New Collegiate Dictionary* did not define "employee" to include "executives." *Id.*

Upon review, counsel's reliance on *Aphrodite* and *Matter of M--* is insufficient to overcome the director's basis for denying the petition on this ground. The 1980 *Aphrodite* and the 1958 *Matter of M--* decisions, while otherwise sound, predate the 1990 codification of the definitions of "managerial capacity" and "executive capacity" in 8 U.S.C. § 1101(a)(44), Pub. L. No. 101-649, § 123, 104 Stat. 4978, § 123 (1990), and the Supreme Court's decision in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992) (hereinafter "Darden"), that defined "employee" in terms of the common-law master-servant relationship. As the definitions of both "managerial capacity" and "executive capacity" now clearly use the word "employee" in describing intracompany transferee managers and executives, the Commissioner's decision in *Aphrodite* declining to impose an employment requirement upon intracompany transferees, while correct at the time, ceased being a valid approach to determining an alien's eligibility for L-1 classification in 1990.[2] Furthermore, as discussed in the director's decision, given that Congress did not define the term "employee" in codifying the definitions of "managerial capacity" and "executive capacity," the Supreme Court instructs that one should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Darden*, 503 U.S. at 322-323.

Therefore, while the *Aphrodite* decision remains instructive as to whether a petitioner may seek L-1 classification for a beneficiary who has a substantial ownership interest in the organization, the determination that an intracompany transferee employed in an executive capacity need not be an "employee" has been superseded by statute. Intracompany transferees, by definition, must now be "employees" in order to be eligible for classification as a managerial or executive employee pursuant to section 101(a)(15)(L) of the Act. As the preference immigrant classification sought in the present matter relies on the same statutory definitions of "managerial capacity" and "executive capacity," the same reasoning would apply to the petitioner under section 203(b)(1)(C) of the Act.

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[2] The INS adopted regulations substantially similar to the definitions of "managerial capacity" and "executive capacity" ultimately codified in 1990 at 8 U.S.C. § 1101(a)(44). *See* 8 C.F.R. §§ 214.2(l)(1)(ii)(B)-(C); 52 F.R. 5738-01 (Feb. 26, 1987). These regulations, which also require that L-1 managers and executives be employees, were generally upheld as consistent with the Act even prior to the 1990 codification of these definitions. *See National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472 (5th Cir. 1989). Therefore, an employment requirement was arguably imposed upon managers and executives seeking L-1 classification as early as 1987.

Counsel further asserts that *Matter of M--* supports the notion that a corporation is a legal entity that is separate and distinct from its stockholders, who are not liable for the debt incurred by the corporation. However, the issue of debts and liabilities of the corporation is separate from the issue of employer/employee, which is not addressed in the cited case.

Lastly, with regard to the director's citing of six factors to be considered in determining when a beneficiary is considered an employee, counsel asserts that the beneficiary can be fired through shareholders' action or by the Board of Directors, similarly arguing that the Board of Directors supervises the beneficiary in his capacity as president. However, counsel's argument lacks merit as the beneficiary is the majority shareholder by virtue of owning 95% of the shares of the entity that wholly owns the petitioner. Thus, the beneficiary himself would be the driving force behind any shareholder resolution. The record also lacks evidence establishing who sits on the petitioner's Board of Directors. Therefore, the AAO cannot conclude that either a Board of Directors' or shareholders' action can be deemed as controlling or supervisory of the work performed by the beneficiary for the petitioning entity. Counsel again emphasizes the intention of the petitioner and beneficiary to have an employer/employee relationship. However, regardless of the intent, 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, simply meaning to have the beneficiary as an employee of the petitioning entity and actually having him fit that role are not one and the same.

Accordingly, as counsel has failed to present persuasive arguments establishing how the beneficiary would be considered an employee under terms of the common-law master-servant relationship in light of the *Darden* decision, the AAO will uphold the decision of the director.

Additionally, while not expressly addressed in the director's decision, the AAO finds that there are additional grounds that warrant a finding of ineligibility.

First, the petitioner must establish that it will employ the beneficiary in a qualifying managerial or executive capacity. In assessing the supporting documents, the AAO will first look to the petitioner's description of the beneficiary's proposed job duties. *See* 8 C.F.R. § 204.5(j)(5). The AAO will then consider this information in light of the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks. In the present matter, the RFE specifically instructed the petition to provide a copy of its organizational chart as well as a detailed description of the beneficiary's proposed job duties. The petitioner's response included an organizational chart, which listed a total of three employees: the beneficiary, one sales manager, and an account assistant. Although the petitioner listed [redacted] as its sales representative, no evidence was submitted to establish that this individual was actually employed at the time the Form I-140 was filed.

Furthermore, while the petitioner provided a supplemental description of the beneficiary's proposed employment, the description was comprised, at least in part, of non-qualifying tasks, including preparing technical seminars and responding to client questions, and overly broad job responsibilities, such as directing the sales manager and supervising the accountant in the

preparation of various tax documents. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Here, the petitioner has not provided sufficient information about the beneficiary's proposed job duties, nor has the petitioner provided sufficient evidence to establish that the petitioner, given its organizational structure at the time of filing, was capable of employing the beneficiary in a managerial or executive capacity. Therefore, the petitioner has failed to establish that the beneficiary would be employed in a qualifying capacity.

Second, 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. Here, the director specifically addressed this issue in the RFE by instructing the petitioner to provide a detailed analysis of the beneficiary's daily activities during his employment abroad as well as the foreign entity's organizational chart depicting the beneficiary's position and the names, job titles, and job duties of the beneficiary's immediate supervisor and subordinates. While the petitioner provided a copy of an organizational chart that seemingly pertains to the foreign entity, the chart does not include the beneficiary's position. As such, the AAO cannot make an accurate determination as to who the beneficiary's subordinates were or the job duties they performed during the beneficiary's employment. Without this highly relevant information, the AAO cannot determine how or whether the beneficiary was relieved from having to spend the primary portion of his time performing non-qualifying tasks.

Third, 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 RFE specifically addressed the issue of common ownership and control between the U.S. petitioner and the beneficiary's foreign employer. The petitioner was expressly instructed to provide evidence that the foreign entity paid for its ownership in the U.S. entity. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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). 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In the present matter, the petitioner did not provide the requested information. As such, the AAO cannot make a determination as to whether the petitioner and the foreign entity have a qualifying relationship as required by 8 C.F.R. § 204.5(j)(3)(i)(C).

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.