U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

File: SRC 05 002 50459 Office: TEXAS SERVICE CENTER Date: SEP 06 2007

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 Director, Texas Service Center, initially approved the nonimmigrant visa petition. The director subsequently issued a notice of intent to revoke, and ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will summarily dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Texas Corporation, states that it provides various services to the international trade industry. The petitioner claims to be an affiliate of the beneficiary's foreign employer, Genesis Quality Services S.A. de C.V., located in Ciudad Juarez, Mexico. The petitioner seeks to employ the beneficiary in the position of quality manager for a three-year period.

The director initially approved the petition on October 7, 2004. The director subsequently issued a notice of intent to revoke the approval on March 24, 2005 based on a recommendation from the U.S. Consulate General in Ciudad Juarez, which denied the beneficiary's application for an L-1A visa after an interview with the beneficiary and an investigation with respect to his overseas employment.

In the notice of intent to revoke, the director noted that the beneficiary presented himself as an independent contractor of the foreign entity since June 2003, and presented contradictory evidence when requested to verify his employment dates. The director also noted the consulate's suggestion that the beneficiary had made fraudulent statements or presented fraudulent documents. In response, counsel denied any fraud on the part of the beneficiary and the petitioner, and submitted extensive documentation of payments received by the beneficiary from the foreign entity from June 2003 through December 2004 in the form of "*honarios asimilables a salarios*." On or about May 25, 2006, the director reaffirmed the approval of the petition stating that the petitioner had provided documentary evidence to establish that the beneficiary was employed by the foreign entity for one continuous year out of the three years preceding the filing of the petition, as required by 8 C.F.R. § 214.2(l)(3)(iii).

Subsequently, upon receipt of additional guidance from the U.S. Consulate General in Cuidad Juarez, the director issued a second notice of intent to revoke the approval of the petition. The director noted that the *honorarios* submitted are "payment demands by a self-employed person as an independent contractor," and that the beneficiary can therefore not be considered an employee of the foreign entity. The director also emphasized that the Consulate General had doubts regarding the validity of the *honorarios* submitted by the beneficiary, as self-employed persons in Mexico are required to register with the Mexican tax revenue agency, "*hacienda*." It was noted that the beneficiary did not register with *hacienda* until November 2004.

In response, the petitioner submitted a decision issued by the Mexican Secretariat of the Treasury and Public Credit, Tax Administration Service, Local Legal Administration of Cuidad Juarez, Deputy Decisions Administration, in response to the beneficiary's petition for an opinion with respect to his requirement to register with that office as a self-employed person and pay taxes accordingly. In the decision, issued on April 24, 2006, the Deputy Decision Administration determined that the fees paid to the beneficiary "are considered to be qualifying as salary" under Mexican income tax law, and therefore the employer, and not the beneficiary, was required to make tax payments associated with the fees paid to the beneficiary. In the

decision, it was noted that the decision was based on information submitted by the beneficiary with his filing "with no presumption of the accuracy thereof."

The director revoked the approval of the petition on November 7, 2006, concluding that the petitioner had failed to establish that the beneficiary was employed by the foreign entity for one year within the three years preceding the filing of the petition as required by 8 C.F.R. § 214.2(l)(3)(iii). The director determined that notwithstanding the claim that the payments made to the beneficiary were comparable to a salary, the beneficiary was an independent contractor and "therefore he cannot be considered to have been employed continuously for one year by the foreign entity."

The petitioner filed a timely appeal on November 29, 2006. The appeal consists of a Form I-290B, Notice of Appeal, on which no reason is stated for the appeal. The petitioner indicated that it is not submitting and does not plan to submit a separate brief or evidence.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

Under U.S. Citizenship and Immigration Services (USCIS) regulations, the approval of an L-1A petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, the director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B).

Upon review, the AAO concurs with the director's decision to revoke approval of the petition. In the present case, the director did raise sufficient factual issues to support the revocation. The notice of intent to revoke and the subsequent revocation were based on evidence that was in the record at the time the notice was issued.

Regulations at 8 C.F.R. § 103.3(a)(1)(v) state, in pertinent part:

> An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

The petitioner has not identified an erroneous conclusion of law or statement of fact in support of the appeal. Accordingly, the appeal must be summarily dismissed.

For the record, the AAO notes that the director's decision is based solely on the beneficiary's status as an independent contractor of the foreign entity during the period between June 2003 and October 2004, the month in which the petition was filed. The regulation at 8 C.F.R. § 214.2(l)(3)(iii) requires that the petitioner submit evidence that the beneficiary has at least one year of full-time employment abroad with a qualifying organization *within the three years preceding the filing of the petition.* (Emphasis added). As there is no

indication that the director considered whether the beneficiary was a bona fide employee of the foreign entity between October 2001 and June 2003, the AAO will consider whether this requirement was met.

The petitioner indicated at the time of filing that the beneficiary had been employed with the foreign entity in the position of quality supervisor since 2001. If it is established through credible documentary evidence that the beneficiary was a full-time employee of the foreign entity for one continuous year between 2001 and June 2003, then the beneficiary's subsequent status as an independent contractor would not affect his eligibility for this visa classification. However, despite multiple opportunities to substantiate its claim that the beneficiary possesses the requisite year of qualifying employment abroad, the petitioner has offered no documentary evidence of the beneficiary's purported employment with the foreign entity as a regular payroll employee between 2001 and June 2003. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). 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)).

Rather than providing evidence of the petitioner's claimed former status as a regular payroll employee of the foreign entity, the petitioner has instead attempted to characterize the beneficiary's services as an independent contractor to the foreign entity as qualifying employment. The director properly rejected the petitioner's characterization. The AAO notes that the above-referenced decision prepared by the Mexican Tax Administration Service was based on evidence submitted to that office by the beneficiary and not made available for review by U.S. Citizenship and Immigration Services, and thus its probative value is limited. The decision from the tax administration specifically mentions that the payment of the beneficiary's fees was consistent with "article 110, section IV of the Income Tax Law," such that they should qualify as salary. The petitioner has provided a poorly translated copy of the beneficiary's contract with the foreign entity dated June 1, 2003, which states that the agreement is based on article 110, section V and section VI of the same Mexican statute. In immigration proceedings, the law of a foreign country is a question of fact which must be proven if the petitioner relies on it to establish eligibility for an immigration benefit, *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973).

Further, there are inconsistencies in the evidence submitted for the record that raise questions regarding its credibility. As evidence of payments to the beneficiary from the foreign entity between June 2003 and October 2004, the petitioner has submitted copies of documents identified as "*recibo por honorarios asimilares a salarios*." There are receipts for the months of January, February, March and May 2004 which show payment of monthly fees in the amount of $30,000.00. There is a second receipt for the month of January 2004 showing a monthly payment of $27,000.00, and all other receipts for 2004 show monthly payments of $27,000. The petitioner did not explain these discrepancies or the existence of two different records for the same month. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner has not submitted evidence on appeal to overcome the director's finding that the beneficiary was an independent contractor of the foreign entity, rather than an employee, from June 2003 through October 2004.

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 L-1 classification. Section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L), requires beneficiaries to have been "employed" abroad and to render services to the same "employer" in the United States. Section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C), which addresses multinational executive and manager immigrant petitions, contains similar provisions. 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 Citizenship and Immigration Services (CIS) has defined the terms "employee," "employer," or "employed" by regulation for purposes of the L-1 classification. *See, e.g.,* 8 C.F.R. § 204.5 and 8 C.F.R. § 214.2(l). Therefore, for purposes of the L-1 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).

While the legacy Immigration and Naturalization Service (INS) has in the past considered the issue of employment in the context of L-1A intracompany transferee petitions, this decision, discussed below, predates the Supreme Court's *Darden* decision by over a decade and can be distinguished from the present matter. *In Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980) (hereinafter *Aphrodite*),

the 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--, 8 I&N Dec. 24 (BIA 1958), 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."

However, the 1980 *Aphrodite* decision, while otherwise sound, predates both 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 *Darden*. 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. Furthermore, 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 having 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 L-1 classification.

Therefore, in considering whether or not one is an "employee" or an "employer," CIS will focus on the common-law touchstone of control. *Clackamas*, 538 U.S. at 450. Factors indicating that a worker is an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; see also Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; cf. New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

It is important to note that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an

employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; New Compliance Manual at § 2-III(A)(1).

In this matter, the record is devoid of evidence of "control" over the beneficiary by the foreign entity or any other indicia of the "conventional master-servant relationship as understood by common-law agency doctrine." The petitioner's self-serving statements that the beneficiary was an "employee" are not probative of an employer-employee relationship. *See Clackamas*, 538 U.S. at 448-449. Overall, using the set of criteria listed above, the petitioner has not established that the beneficiary and the foreign employer had a "conventional master-servant relationship as understood by common-law agency doctrine." The petitioner has not demonstrated that there were enough factors of "control" present to establish that the beneficiary was an "employee" of the foreign employer, as the petitioner has not adequately established the terms of the contractual relationship between the beneficiary and the foreign entity for the period June 2003 through October 2004.

Accordingly, the record does not contain evidence that the beneficiary was employed for one continuous year during the three years preceding the filing of this petition and the petition approval was properly revoked.

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. Inasmuch as the petitioner has failed to identify specifically an erroneous conclusion of law or a statement of fact in support of the appeal, the petitioner has not sustained that burden.

ORDER: The appeal is summarily dismissed.