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U.S. Citizenship and Immigration Services

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[redacted]

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File: SRC 05 138 51151 Office: TEXAS SERVICE CENTER Date: SEP 12 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)

IN 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, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of president to open a new office in the United States 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 corporation organized under the laws of the State of Texas, claims to be a manufacturer of prefabricated homes.[1]

The director denied the petition concluding that the petitioner failed to demonstrate (1) that the beneficiary was employed full-time abroad by a qualifying organization for one continuous year; or (2) that the petitioner, within one year of the approval of the petition, will support an executive or managerial position, specifically because the petitioner failed to establish that a sufficient investment had been made in the United States operation.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel asserts that, despite assertions in the record that the beneficiary was "self employed" abroad, the petitioner established that the foreign employer's control over the beneficiary created an employee-employer relationship. Counsel further asserts that, because the regulations require neither that an investment be made in the United States entity before the approval of the petition nor directly by the foreign employer, the petitioner sufficiently established the size of the United States investment and that the intended United States operation, within one year, will support an executive or managerial position.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Section 101(a)(15)(L) states in pertinent part as follows:

> [A]n alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge[.]

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

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[1]It should be noted that, according to Texas state corporate records, the petitioner's corporate status in Texas is not in good standing. Therefore, as the State of Texas has forfeited the petitioner's corporate privileges, the company can no longer be considered a legal entity in the United States. Therefore, if the instant appeal were not being dismissed for the reasons set forth herein, this would call into question the petitioner's continued eligibility for the benefit sought.

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(*1*) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(*2*) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(*3*) The organizational structure of the foreign entity.

The first issue in this proceeding is whether the petitioner has established that the beneficiary was employed full-time abroad by a qualifying organization for one continuous year within the three years preceding the filing of the petition.

In this matter, the petitioner asserts that the beneficiary was employed as a "logistics manager" by an Israeli sole proprietorship from March 2001 until May 2003. In support of its assertion, the petitioner submitted a letter dated March 31, 2005 from the foreign organization identifying these dates of employment.

On May 19, 2005, the director requested additional evidence. The director requested, *inter alia*, evidence of the beneficiary's overseas experience and a list of the beneficiary's day-to-day job duties with the overseas employer.

In response, the petitioner provided translated "salary stubs" which indicate that the beneficiary was paid for services in March 2001, April 2001, April 2003, and May 2003. All four of these stubs indicate that the beneficiary started working for the foreign organization in March 2001. However, the petitioner did not submit salary stubs, or any proof of employment, for those months between April 2001 and April 2003.

The petitioner also submitted a letter from the foreign organization dated July 21, 2005, which reiterates that the beneficiary was employed "from March 2001 until May 2003" and also states, in pertinent part, the following:

> [The beneficiary] was [the foreign organization's] representative to oversee the work of the constructors, secured the completion of all agreements made between us and brought the construction to its fruition according to the planes [sic] on file.
>
> [The beneficiary] held the responsibility to immediately notify the constructors and [the foreign employer] about any obstacles or problems that arose between the parties.
>
> [The beneficiary] worked as a self employed constructor and received payment according to the job completion of the projects he supervised.

On June 8, 2006, the director denied the petition. The director determined that the petitioner failed to establish that the beneficiary was employed full-time abroad by a qualifying organization for one continuous year.

On appeal, counsel asserts that, despite assertions in the record that the beneficiary was "self employed" abroad, the petitioner established that the foreign employer's "control" over the beneficiary created an employee-employer relationship for purposes of this visa classification. Counsel argues that, in the record, the beneficiary is repeatedly referred to as an "employee" of the foreign organization. Counsel further argues that "control," and thus employment, is evidenced by the foreign organization's purported "transfer" of the beneficiary to the United States as well as the salary stubs' indication that taxes were withheld and that the beneficiary was given an "employee number." Finally, counsel asserts that the beneficiary's duties abroad,

such as acting as the foreign organization's "representative," are further indicia of "control" thus establishing an employee/employer relationship.

Upon review, the petitioner's assertions are not persuasive.

In this matter, the record does not establish that the beneficiary was employed full-time abroad by a qualifying organization for one continuous year within the three years preceding the filing of the petition.

First, as a threshold issue, the petitioner has not established that the beneficiary was engaged for the required one-year period in any capacity as either an independent contractor or an employee. The director specifically requested that the petitioner submit payroll evidence establishing the beneficiary's purported periods of employment abroad. However, in response, the petitioner submitted evidence of two two-month long stints of "employment" with the foreign organization separated by almost two years. This evidence does not establish full-time employment for one continuous year. To the contrary, this evidence establishes, at most, four months of possible employment over a two-year period. Furthermore, 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). 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, for this reason alone, the petition may not be approved.

Second, as correctly determined by the director, the record indicates that the beneficiary was "self employed" when performing services for the foreign organization and that he was paid "according to the job completion of the projects he supervised." Therefore, the beneficiary was not an "employee" of the foreign entity. 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).[2]

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, which predates the Supreme Court's *Darden* decision by over a decade, 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

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[2]While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." *See, e.g., Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1000 (1994). However, in the case of the above-cited sections of the Immigration and Nationality Act, there is no indication that Congress intended for the undefined terms "employer" or "employed" to have a broader application than that of the corresponding undefined term "employee." Therefore, in the absence of an intent by Congress to impose broader definitions, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* statutory construction test, apply to the terms "employee," "employer," and "employed" as used in 8 C.F.R. § 214.2(l), 8 U.S.C. § 1101(a)(15)(L), 8 U.S.C. § 1101(a)(44); and 8 U.S.C. § 1153(b)(1)(C). That being said, there are instances in the Act where Congress may have intended a more defined application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

"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." *Id.*

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.[3] 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 superceded 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).

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[3] 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.

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. Likewise, the duties described do not establish that the foreign organization "controlled" the beneficiary's provision of services as a logistics manager. To the contrary, the fact that the beneficiary was paid according to the completion of projects and that he was obligated to report "problems" or "obstacles" implies that the beneficiary worked quite independently and was paid to perform a specific service. As explained above, being paid according to the "agreed cost of performing a particular job" is a key factor in determining whether a worker is an employee or an independent contractor. There is also no evidence that the foreign employer could assign "additional projects" to the beneficiary or that it controlled the hours of work and the duration of the job. Importantly, it also appears, given the beneficiary's independence and skill set, that he was engaged in a distinct occupation as a "self employed constructor." Again, these are all key elements of control, which need to be considered.

Finally, the petitioner offers no evidence regarding the significance of the withholding of taxes or the assignment of an employee number in Israel. While such factors could be indicia of control of an employee, 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). Regardless, the withholding of taxes or the placement of a worker on a payroll will not alone establish that the worker was an "employee" when weighed against competing factors undermining this purported "control." Again, 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.

To summarize, 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. Moreover, when those competing factors which indicate that the beneficiary was actually an independent contractor or service provider are weighed against the indicia of "control," it is clear that the beneficiary was more likely than not an independent contractor abroad.

Accordingly, the petitioner has not established that the beneficiary was employed full-time abroad by a qualifying organization for one continuous year within the three years preceding the filing of the petition, and the petition may not be approved for this reason.

The second issue in this matter is whether the petitioner established that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position. Specifically, the issue is whether the petitioner has established that a sufficient investment has been made in the United States operation as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(*2*).

In support of its petition, the petitioner did not describe an investment in the United States operation. On May 19, 2005, the director requested, *inter alia*, evidence of the transfer of funds to the petitioner by the foreign entity. In response, counsel submitted a letter dated February 1, 2006 in which he states that "[t]he foreign entity has not been able to transfer funds to the beneficiary due to the pending approval of the L-1A for the one year period." The petitioner also submitted a letter dated February 1, 2006 in which it states that the foreign entity will transfer funds to it "as soon as approval [of the L-1A petition] is received." Finally, the petitioner submitted a business plan which indicates that $12,000.00 of "start-up money" will be contributed by the owner of the foreign organization and $30,000.00 will be contributed by the beneficiary. The rest of the petitioner's financing will allegedly come from a series of loans.

On June 8, 2006, the director denied the petition. The director determined that the petitioner failed to establish that the United States operation, within one year of the approval of the petition, will support an executive or managerial position because the petitioner failed to establish that a sufficient investment had been made in the United States operation. The director concluded that, because the proposed investment had not been made and because the sources of the investment did not include the foreign organization, the petitioner failed to satisfy this criterion.

On appeal, counsel asserts that, because the regulations require neither that an investment be made in the United States entity before the approval of the petition nor directly by the foreign employer, the petitioner has sufficiently established the size of the United States investment and that the intended United States operation, within one year, will support an executive or managerial position.

Upon review, the petitioner's assertions are not persuasive.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

In this matter, the petitioner admits that it has not received any of the "start up money" from abroad and that this investment is contingent upon the approval of the instant petition. Therefore, as of the date the petition was filed, no investment had been made in the United States operation. Counsel's argument that this

investment need not be made at the time the petition is filed is without merit. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Absent any investment in the United States operation at the time the petition was filed, the petitioner has not demonstrated that the enterprise will likely succeed and rapidly expand as it moves away from the developmental stage. Therefore, the petition may not be approved for this reason.

Furthermore, the petitioner has not established that it has been approved for any of the loans identified in the business plan which will make up the bulk of its financing. 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.[4]

Accordingly, the petitioner failed to establish that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position because a sufficient investment had not been made in the United States operation as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(*2*).

Beyond the decision of the director, the petitioner has also failed to establish that the beneficiary's purported employment abroad was primarily executive or managerial in nature as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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

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[4]It is noted that the director also determined that, because the source of the proposed investment of "start up money" would be the owner of the foreign organization (a sole proprietorship), the petitioner failed to satisfy the criterion in 8 C.F.R. § 214.2(l)(3)(v)(C)(*2*). However, a sole proprietorship is not a legal entity apart from its owner or owners. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm. 1984). Therefore, to the extent the director denied the petition based on the owner of the foreign sole proprietorship being the source of some of the "start-up money" and not the foreign organization itself, this determination is withdrawn. Nevertheless, for the reasons set forth above, as the petitioner has failed to establish that a sufficient investment has been made in the United States operation, the director properly denied the petition on this basis.

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), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner does not clarify whether the beneficiary is claiming to have been primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to have been employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

In this matter, the petitioner asserts that the beneficiary was employed abroad as a "logistics manager." His purported duties were described in a letter from the foreign organization dated July 21, 2005 as follows:

> [The beneficiary] served as a supervisor for construction of single unit apartments built by [the foreign organization].
>
> [The beneficiary] was [the foreign organization's] representative to oversee the work of the constructors, secured the completion of all agreements made between us and brought the construction to its fruition according to the planes [sic] on file.
>
> [The beneficiary] held the responsibility to immediately notify the constructors and [the foreign employer] about any obstacles or problems that arose between the parties.

The petitioner also submitted an organizational chart for the foreign organization which shows the beneficiary supervising eight subordinate workers.

In view of the above, the record does not establish that the beneficiary was employed abroad in a primarily executive or managerial capacity. In support of its petition, the petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary did on a day-to-day basis other than oversee construction projects. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary was actually performing managerial duties. 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).

The petitioner has also failed to establish that the beneficiary supervised and controlled the work of other supervisory, managerial, or professional employees, or managed an essential function of the organization. As explained in the organizational chart, the beneficiary allegedly managed eight people in their construction of apartments. None of the subordinate workers is described as having supervisory or managerial duties. Moreover, as the petitioner did not provide detailed job descriptions for the subordinate workers, it is impossible to determine whether any of the workers could be classified as a professional. Therefore, the record indicates that the beneficiary was a first-line supervisor. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. at 604. Therefore, the petitioner has not established that the beneficiary was employed primarily in a managerial capacity.

Similarly, the petitioner has failed to establish that the beneficiary acted in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within an organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary was acting primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary did on a day-to-day basis. Moreover, as explained above, the record indicates that the beneficiary worked as a first-line supervisor. Finally, the organizational chart for the foreign organization indicates that the "owner" likely directed the organization and not the beneficiary. Therefore, the petitioner has not established that the beneficiary was employed primarily in an executive capacity.

Accordingly, the petitioner did not establish that the beneficiary had been employed abroad in an executive or managerial capacity as required by 8 C.F.R. § 214.2(l)(3)(v)(B), and for this additional reason the petition may not be approved.

Beyond the decision of the director, the petitioner has not established that sufficient physical premises to house the new office have been secured as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

In support of its assertion that it has secured sufficient physical premises to house the United States operation, the petitioner submitted a copy of a lease dated April 4, 2005. However, the beneficiary is the lessee, not the petitioner. Moreover, as the lease prohibits assignment and subletting by the lessee without the lessor's consent in paragraph 6, and the record is devoid of any evidence of the lessor having given consent, the petitioner may not occupy the premises. Therefore, the petitioner has not secured sufficient physical premises, and the petition may not be approved for this additional reason.

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.