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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

File: EAC 07 032 52837 Office: VERMONT SERVICE CENTER Date: AUG 0 1 2008

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 BENEFICIARY:

[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, Vermont 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-1B nonimmigrant intracompany transferee having specialized knowledge 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 Minnesota corporation, claims to be in the business of "heavy construction and equipment rental."[1]

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in a capacity involving specialized knowledge.

On appeal, counsel for the petitioner asserts that the petitioner has satisfied the criteria for establishing that the beneficiary will be employed in a specialized knowledge capacity. In support, counsel submits a brief and additional evidence.

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. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, 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.

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

(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

[1]It should be noted that, according to Minnesota state corporate records, the petitioner's corporate status in Minnesota is "inactive." Accordingly, this would call into question the continued eligibility of the petitioner for the benefit sought if the appeal were not being dismissed for the reasons set forth herein.

> services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), provides:

> For purposes of section 101(a)(15)(L), an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

Furthermore, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D) defines "specialized knowledge" as:

> [S]pecial knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

The primary issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in the United States in a capacity involving specialized knowledge. 8 C.F.R. § 214.2(l)(3)(ii).

The foreign entity described the beneficiary's proposed duties and purported specialized knowledge in a letter dated October 16, 2006 as follows:

> [The beneficiary] has **proprietary knowledge** of our company's business plans and business strategies, he is the one who has developed the vision to expand into the United States. He understands our bidding practices, cost structure, and overall project management.
>
> * * *
>
> [The beneficiary] will serve as President of our U.S. subsidiary. In the first year of operation [the beneficiary] will focus primarily on the [sic] bidding new contracts and hiring and training operations staff.
>
> [The beneficiary] will apply his specialized knowledge of bidding contracts and understanding resource use and cost constraints to his every-day [sic] management of our U.S. office.
>
> While working in the United States, [the beneficiary] will be engaged in the following:
>
> - Market research;
> - Networking with area contractors with different, but complimentary contracting specialties;
> - Analysis of proposed projects and cost-effectiveness of new projects;

- Hiring and training staff;
- Set phase schedules for projects;
- Directing the work of new staff on contracted projects; and
- Establish quality control/auditing/accounting procedures for the new office.

On December 11, 2006, the director requested additional evidence. The director requested, *inter alia*, evidence that the beneficiary's knowledge can be distinguished from those with only elementary or basic knowledge, a description of all pertinent training received by the beneficiary, an explanation of the minimum amount of time required to train an employee to fill the proffered position, and evidence that the processes and methodologies of which the beneficiary has knowledge are different from those used elsewhere in the industry.

In response, the foreign employer submitted a letter dated January 31, 2007 in which it asserts that the beneficiary received a 2-year degree in Forest Technology from a Canadian university and has received training in the operation of various pieces of equipment such as graders, bulldozers, and front end loaders. The foreign entity also claims that the beneficiary has received various certifications from the Province of Ontario. With regards to training necessary to the proffered position, the foreign entity asserts that the beneficiary's position "is not a position that has a set number of years of training required." Finally, the foreign entity further describes the beneficiary's purported specialized knowledge, and attempts to distinguish this knowledge from knowledge commonly held in the industry, as follows:

> [The beneficiary] has uncommon knowledge about the climatic properties of the region. He is familiar with the various soil types and the specific regional issues related to forestry, soil types, minerals, as well as environmental statu[t]es.
>
> As mentioned above, [the beneficiary] has completed formal training in a wide array of substantive areas. This high level of competence is not at all found widely in the industry and could not be easily trained.

The foreign entity also submitted a letter from a third party which indicates that the beneficiary has advanced knowledge of "natural path placement," which is the application of knowledge of "ecological factors to building roads or rails through forested areas."

On May 7, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed in a capacity involving specialized knowledge.

On appeal, counsel for the petitioner asserts that the petitioner has satisfied the criteria for establishing that the beneficiary will be employed in a specialized knowledge capacity. In support, counsel submits a brief and additional evidence, including additional opinion letters from purported experts attesting to the beneficiary's specialized knowledge.

Upon review, the petitioner's assertions are not persuasive in demonstrating that the beneficiary will be employed in a position involving specialized knowledge as defined at 8 C.F.R. § 214.2(l)(1)(ii)(D) or that the

beneficiary possesses specialized knowledge.

In examining the specialized knowledge capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. *See* 8.C.F.R. § 214.2(l)(3). **The petitioner must submit a detailed job** description of the services performed sufficient to establish specialized knowledge. In this matter, the petitioner fails to establish that this position requires an employee with specialized knowledge or that the beneficiary has specialized knowledge.

Although the petitioner repeatedly asserts that the beneficiary's position requires "specialized knowledge" and that the beneficiary has "specialized knowledge" capacity, the petitioner has not adequately articulated any basis to support this claim. The petitioner has failed to identify any specialized or advanced body of knowledge which would distinguish the beneficiary's role from that of other construction operators employed in the industry at large. Going on record without 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)). Specifics are clearly an important indication of whether a beneficiary's duties involve specialized knowledge; otherwise, meeting the definitions would simply be a matter of reiterating the regulations. *See 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 asserts that the beneficiary's knowledge of various components of the petitioning organization's business constitutes "specialized knowledge." The petitioner claims that the beneficiary has specialized knowledge of "bidding contracts and understanding resource use and cost constraints" and "uncommon knowledge" of regional "climatic properties" associated with the northern United States and southern Canada. The petitioner also claims that the beneficiary has specialized knowledge of building roads in forested areas and "proprietary knowledge" of the petitioning organization's business plans and strategies. Finally, the petitioner claims that the beneficiary's "wide array" of training in heavy equipment operation and forestry, coupled with his lengthy experience as a construction operator, is not "found widely in the industry and could not be easily trained." However, despite these assertions, the record does not establish how, exactly, the beneficiary's knowledge of bidding contracts, business plans and strategies, resource use and cost constraints, regional climatic properties, and road building differs so significantly from that possessed by other northern climate construction operations that a similarly employed person in the industry could not perform the duties of the position. The petitioner never establishes the material difference between the petitioning organization's operations, contracts, and plans and the operations, contracts, and plans of other competing northern climate construction companies, which requires noteworthy or uncommon knowledge not possessed generally by similarly employed northern climate construction operators.

Overall, the record does not establish that the beneficiary's knowledge is substantially different from the knowledge possessed by construction operators throughout the northern climate construction industry. The fact that the beneficiary is "unparalleled" in his experience, or that various third parties consider the beneficiary's services to be particularly valuable, does not establish that his knowledge is uncommon or noteworthy. All employees can be said to possess unique and unparalleled skill sets to some degree; however, a unique skill set that can be imparted to another similarly experienced and educated employee without significant economic inconvenience is not "specialized knowledge." In this matter, it has not been

established that the beneficiary's knowledge of heavy equipment, bidding, business plans, and forestry is not materially identical to that possessed by employees of competing northern climate construction companies. Moreover, any proprietary or unique qualities of the petitioner's services do not establish that knowledge is "specialized." Rather, the petitioner must establish that qualities of the unique or proprietary service require this employee to have knowledge beyond what is common in the industry. This has not been established in this matter. The fact that other workers may not have very specific knowledge regarding the petitioner's business plans or strategies is not relevant to these proceedings if this knowledge gap could be closed by the petitioner by simply revealing the information to a newly hired, similarly experienced employee after being employed by the petitioner.[2]

Beyond the decision of the director, and for the same reasons explained above, the petitioner has also failed to establish that the beneficiary was employed abroad in a position that was executive, managerial, or involved specialized knowledge. 8 C.F.R. § 214.2(l)(3)(iv). The petitioner will be denied for this additional reason.

The AAO does not dispute the possibility that the beneficiary is a skilled and experienced employee who has been, and would be, a valuable asset to the petitioner. However, it is appropriate for the AAO to look beyond the stated job duties and consider the importance of the beneficiary's knowledge of the business's product or service, management operations, or decision-making process. *Matter of Colley*, 18 I&N Dec. 117, 120 (Comm. 1981) (citing Matter of Raulin, 13 I&N Dec. 618(R.C. 1970) and *Matter of LeBlanc*, 13 I&N Dec. 816 (R.C. 1971)). As stated by the Commissioner in *Matter of Penner*, when considering whether the beneficiaries possessed specialized knowledge, "the *LeBlanc* and *Raulin* decisions did not find that the occupations inherently qualified the beneficiaries for the classifications sought." 18 I&N Dec. at 52. Rather, the beneficiaries were considered to have unusual duties, skills, or knowledge beyond that of a skilled worker. *Id.* The Commissioner also provided the following clarification:

> A distinction can be made between a person whose skills and knowledge enable him or her to produce a product through physical or skilled labor and the person who is employed primarily for his ability to carry out a key process or function which is important or essential to the business firm's operation.

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[2]It is noted that, on appeal, counsel submits additional letters from purported experts attesting to the beneficiary's claimed specialized knowledge. However, the petitioner was put on notice of required evidence pertaining to the beneficiary's claimed specialized knowledge and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. As the petitioner failed to submit this evidence in response to the Request for Evidence, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director. Regardless, even if the AAO considered the evidence, it is noted that the letters would not be persuasive in establishing that the beneficiary has specialized knowledge. As noted by [redacted] in his undated letter, whether the beneficiary has "specialized knowledge is dependent on what definition you use." Consequently, and as noted above, just because the beneficiary may be a particularly experienced, educated, and valued northern climate construction operator does not establish that his knowledge of bidding, operations, business plans, forestry, and road construction is noteworthy or uncommon and, thus, constitutes "specialized knowledge."

Id. at 53.

It should be noted that the statutory definition of specialized knowledge requires the AAO to make comparisons in order to determine what constitutes specialized knowledge. The term "specialized knowledge" is not an absolute concept and cannot be clearly defined. As observed in *1756, Inc. v. Attorney General*, "[s]imply put, specialized knowledge is a relative . . . idea which cannot have a plain meaning." 745 F. Supp. 9, 15 (D.D.C. 1990). The Congressional record specifically states that the L-1 category was intended for "key personnel." See generally, H.R. REP. NO. 91-851, 1970 U.S.C.C.A.N. 2750. The term "key personnel" denotes a position within the petitioning company that is "of crucial importance." Webster's II New College Dictionary 605 (Houghton Mifflin Co. 2001). In general, all employees can reasonably be considered "important" to a petitioner's enterprise. If an employee did not contribute to the overall economic success of an enterprise, there would be no rational economic reason to employ that person. An employee of "crucial importance" or "key personnel" must rise above the level of the petitioner's average employee. Accordingly, based on the definition of "specialized knowledge" and the congressional record related to that term, the AAO must make comparisons not only between the claimed specialized knowledge employee and the general labor market, but also between the employee and the remainder of the petitioner's workforce. While it may be correct to say that the beneficiary in the instant case is a highly skilled and productive employee, this fact alone is not enough to bring the beneficiary to the level of "key personnel."

Moreover, in *Matter of Penner*, the Commissioner discussed the legislative intent behind the creation of the specialized knowledge category. 18 I&N Dec. 49 (Comm. 1982). The decision noted that the 1970 House Report, H.R. REP. NO. 91-851, stated that the number of admissions under the L-1 classification "will not be large" and that "[t]he class of persons eligible for such nonimmigrant visas is narrowly drawn and will be carefully regulated by the Immigration and Naturalization Service." *Id.* at 51. The decision further noted that the House Report was silent on the subject of specialized knowledge, but that during the course of the sub-committee hearings on the bill, the Chairman specifically questioned witnesses on the level of skill necessary to qualify under the proposed "L" category. In response to the Chairman's questions, various witnesses responded that they understood the legislation would allow "high-level people," "experts," individuals with "unique" skills, and that it would not include "lower categories" of workers or "skilled craft workers." *Matter of Penner*, 18 I&N at 50 (citing H.R. Subcomm. No. 1 of the Jud. Comm., Immigration Act of 1970: Hearings on H.R. 445, 91st Cong. 210, 218, 223, 240, 248 (November 12, 1969)).

Reviewing the Congressional record, the Commissioner concluded in *Matter of Penner* than an expansive reading of the specialized knowledge provision, such that it would include skilled workers and technicians, is not warranted. The Commissioner emphasized that the specialized knowledge worker classification was not intended for "all employees with any level of specialized knowledge." *Matter of Penner*, 18 I&N Dec. at 53. Or, as noted in *Matter of Colley*, "[m]ost employees today are specialists and have been trained and given specialized knowledge. However, in view of the House Report, it can not be concluded that all employees with specialized knowledge or performing highly technical duties are eligible for classification as intracompany transferees." 18 I&N Dec. at 119. According to *Matter of Penner*, "[s]uch a conclusion would permit extremely large numbers of persons to qualify for the 'L-1' visa" rather than the "key personnel" that Congress specifically intended. 18 I&N Dec. at 53; *see also 1756, Inc. v. Attorney General*, 745 F. Supp. at 15 (concluding that Congress did not intend for the specialized knowledge capacity to extend to all employees

with specialized knowledge, but rather to "key personnel" and "executives.")

A 1994 Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) memorandum written by the then Acting Executive Associate Commissioner also directs CIS to compare the beneficiary's knowledge to the general United States labor market and the petitioner's workforce in order to distinguish between specialized and general knowledge. The Executive Associate Commissioner notes in the memorandum that "officers adjudicating petitions involving specialized knowledge must ensure that the knowledge possessed by the beneficiary is not general knowledge held commonly throughout the industry but that it is truly specialized." Memorandum from [redacted] Acting Executive Associate Commissioner, Immigration and Naturalization Service, *Interpretation of Specialized Knowledge*, CO 214L-P (March 9, 1994). A comparison of the beneficiary's knowledge to the knowledge possessed by others in the field is therefore necessary in order to determine the level of the beneficiary's skills and knowledge and to ascertain whether the beneficiary's knowledge is advanced. In other words, absent an outside group to which to compare the beneficiary's knowledge, CIS would not be able to "ensure that the knowledge possessed by the beneficiary is truly specialized." *Id.* The analysis for specialized knowledge therefore requires a test of the knowledge possessed by the United States labor market, but does not consider whether workers are available in the United States to perform the beneficiary's job duties.

As explained above, the record does not distinguish the beneficiary's knowledge as more advanced than the knowledge possessed by other people operating northern climate construction operations. As the petitioner has failed to document any materially unique qualities to the beneficiary's knowledge, the petitioner's claims are not persuasive in establishing that the beneficiary, while perhaps highly skilled, would be a "key" employee in the sense that this knowledge could not be materially replicated by a person similarly employed by a competing business. While it is acknowledged that the petitioner claims that the beneficiary is the "president" of the petitioning organization, the record is not persuasive in establishing that the beneficiary has knowledge that exceeds that of any other similarly experienced worker in the industry or that he has received special training in the company's product or service which would separate him from other workers operating generally in the northern climate construction industry.

The legislative history of the term "specialized knowledge" provides ample support for a restrictive interpretation of the term. In the present matter, the petitioner has not demonstrated that the beneficiary should be considered a member of the "narrowly drawn" class of individuals possessing specialized knowledge. *See 1756, Inc. v. Attorney General, supra* at 16. Based on the evidence presented, it is concluded that the beneficiary will not be employed in the United States, and was not employed abroad, in a capacity involving specialized knowledge. For these reasons, the appeal will be dismissed.

Beyond the decision of the director, the record is not persuasive in establishing that the beneficiary will be "employed" in the United States, or has been "employed" abroad, by qualifying organizations. 8 C.F.R. §§ 214.2(l)(3)(ii)-(iii). It does not appear that the beneficiary's relationship with either the foreign entity or the United States entity can reasonably be classified as a conventional master-servant relationship as understood by common-law agency doctrine. In this matter, it is asserted that the beneficiary is the principal owner and president of both the petitioner and the foreign entity. Accordingly, it appears that the beneficiary has been and

will be a proprietor of a business rather than an "employee" who is "employed" by an "employer." Therefore, the petitioner is not eligible for the benefit sought, and the petition may not be approved for this additional reason.

As explained in 8 C.F.R. §§ 214.2(l)(3)(ii) and (iii), to be eligible for the benefit sought, the petitioner must establish that the beneficiary will be "employed" in the United States and that the beneficiary had had at least one continuous year of full-time "employment" abroad. 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. Neither the legacy Immigration and Naturalization Service (INS) nor 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. § 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).[3]

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[3]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

While the legacy INS has in the past considered the issue of employment in the context of L-1A intracompany transferee petitions, these decisions, which both predate the Supreme Court's *Darden* decision by over a decade, can be distinguished from the present matter. The decisions in *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980) (hereinafter *Aphrodite*) and *Matter of Allan Gee, Inc.*, 17 I&N Dec. 296 (Reg. Comm. 1979) (hereinafter *Allan Gee*), both primarily addressed the ability of corporate entities to file petitions on behalf of beneficiaries who have substantial ownership stakes in those entities. The soundness of this particular conclusion is not being questioned and is not at issue in the present matter. However, these decisions fail to directly address how, or whether, petitioners must establish that beneficiaries are bona fide "employees" of the petitioners. The decisions also fail to address how, or whether, petitioners must establish that they are bona fide "employers" of employees.

In the 1980 *Aphrodite* decision, 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 commission 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 to 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 commission 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 *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

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"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).

valid approach to determining an alien's eligibility for L-1 classification in 1990.[4] 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. Regardless, as the petitioner in the instant matter is seeking to classify the beneficiary as one having specialized knowledge, the decision in *Aphrodite* would be inapposite even if it were still instructive on this issue.

Moreover, in the 1979 *Allan Gee* decision, the acting regional commissioner of INS determined that the petitioning corporation could seek L-1 classification for the beneficiary even though the beneficiary was the sole stockholder of the petitioner. 17 I&N Dec. at 298. Relying on the basic legal tenet that corporations are separate and distinct from their stockholders, INS correctly concluded that the Act does not prohibit a petitioning corporation from employing, and petitioning for, a beneficiary who happens to own all of a petitioner's stock. 17 I&N Dec. at 297-298. Importantly, however, the decision does not address how, or whether, petitioners must establish that such beneficiaries are bona fide "employees" of the petitioners. It is unclear why the acting regional commission did not take this crucial next step in the analysis. While it is correct that a petitioner may employ and seek L-1 classification for a beneficiary who happens to have a significant ownership interest in a petitioner, this does not automatically mean that such beneficiaries are bona fide employees. The *Allan Gee* decision simply fails to address the issue being addressed in the instant matter.

Regardless, as with the *Aphrodite* decision, the *Allan Gee* decision was decided approximately 13 years before the Supreme Court's decision in *Darden*. As explained above, the *Darden* decision indicates that where Congress fails to define the term "employee," courts 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. As indicated above, the Act fails to define the terms "employee," "employer," and "employed" for L-1 classification purposes. Therefore, while a petitioner, which is solely or primarily owned by a beneficiary, *may* file a petition for that beneficiary as an L-1A intracompany transferee, the question of whether such a beneficiary will truly be an "employee" as now required by the Act is a separate and independent matter which will be scrutinized on a case-by-case basis utilizing the analysis set forth by the Supreme Court in *Darden*, 503 U.S. at 323-324, and *Clackamas*, 538 U.S. at 449-450. In other words, while a petitioner may file a petition for a beneficiary who is its sole or primary owner, this does not necessarily

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[4]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.

mean that the beneficiary will be a bona fide "employee." *See Clackamas*, 538 U.S. 440. In fact, courts employing this analysis in considering whether an owner of an "employer" is also an "employee" have concluded, in certain contexts, that the owner is not an "employee." *See, e.g., Ziegler v. Anesthesia Associates of Lancaster, Ltd.*, 74 Fed. Appx. 197, 2003 WL 22048003 (3rd Cir. 2003) (unpublished); *Solon v. Kaplan*, 398 F.3d 629 (7th Cir. 2005). Using similar analysis, CIS could reasonably conclude that beneficiaries who own and control petitioners, as in the cases of *Allan Gee Inc.* and *Aphrodite Investments Limited*, might not, given the facts of individual cases, be "employees" of those petitioners.

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).

Within the context of L-1 nonimmigrant petitions, when a worker is also a partner, officer, member of a board of directors, or a major shareholder, the worker may only be defined as an "employee" if he or she is subject to the organization's "control." *See Clackamas*, 538 U.S. at 449-450; *see also New Compliance Manual* at § 2-III(A)(1)(d). Factors to be addressed in determining whether a worker, who is also an owner of the organization, is an employee include:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.
- Whether and, if so, to what extent the organization supervises the individual's work.
- Whether the individual reports to someone higher in the organization.
- Whether and, if so, to what extent the individual is able to influence the organization.

- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.

- Whether the individual shares in the profits, losses, and liabilities of the organization.

Clackamas, 538 U.S. at 449-450 (citing *New Compliance Manual*).

Again, it is important to note that this list need not be exhaustive and such questions cannot be decided in every case by a "shorthand formula or magic phrase." *Id.* at 450 (citing *Darden*, 503 U.S. at 324). Moreover, in applying the above test, the mere fact that a "person has a particular title – such as partner, director, or vice president – should not necessarily be used to determine whether he or she is an employee or a proprietor." *Clackamas*, 538 U.S. at 450; *cf. Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988) (stating that a job title alone is not determinative of whether one is employed in an executive or managerial capacity). Likewise, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, as was true in applying common-law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

Applying the *Darden* and *Clackamas* tests to this matter, the record is not persuasive in establishing that the beneficiary has been or will be an "employee" employed by an "employer." As indicated above, the petitioner claims that the beneficiary owns and controls both it and the Canadian entity. The foreign entity further asserts in the letter dated October 16, 2006 that the beneficiary "has acted as the Owner and President of the Canadian Company, Tom Veert Contracting, Limited, since its establishment 22 years ago" and that "[a]s the President, [the beneficiary] has been responsible for management of every facet of the business." Finally, as indicated in the January 31, 2007 letter, the foreign entity claims that the beneficiary "sets the employment standards." In view of the above, it appears that the beneficiary will be, and has been, a proprietor of this business. He is not, and was not, an "employee" as defined above. It has not been established that the beneficiary will be "controlled" by the petitioning organization or that the beneficiary's employment could be terminated. To the contrary, the beneficiary *is* the petitioning organization for all practical purposes. He controls the organization; he is responsible for the management of "every facet" of the business; he cannot be fired; he reports to no one; he will set the rules governing his work; he sets all employment standards; and he will share in all profits and losses. Therefore, based on the tests outlined above, the petitioner has not established that the beneficiary will be, or has been, "employed" as an "employee" by an "employer." Accordingly, the petition will not be approved for these additional reasons.

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 of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.