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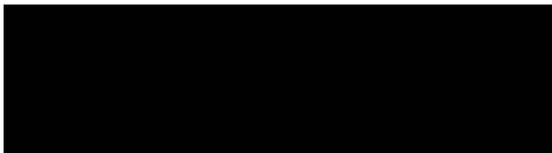
Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Texas corporation established in 2004 for the purpose of owning, managing, and operating retail stores. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director denied the petition based on the determination that the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, counsel disputes the director's conclusion and submits a brief with supporting arguments. Additionally, the petitioner provides sworn affidavits from the beneficiary and two of his subordinates.

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

\* \* \*

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The primary issue in this proceeding is whether the petitioner would employ the beneficiary in a capacity that is managerial or executive.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the Form I-140, the petitioner submitted a letter dated September 29, 2006, which states that the beneficiary will be responsible for the following: hiring and firing managers; supervising subordinates; overseeing the preparation of sales and inventory reports; reviewing and analyzing sales data; establishing and implementing policies to manage and achieve marketing goals;

reviewing financial reports, the budget, and expense reports; setting prices; overseeing the marketing carried out by subordinates; and looking for additional business locations.

On August 30, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide, *inter alia*, a detailed description of the beneficiary's prospective employment in the United States, including specific job duties and information about the beneficiary's subordinates, if any. The petitioner was also asked to provide its organizational chart, illustrating the beneficiary's position with respect to others in the company.

In response, the petitioner provided a letter dated September 24, 2007, which included the exact same job description as the one initially provided in support of the petition. No further details were added to describe the beneficiary's daily tasks. The petitioner stated that the beneficiary supervises three subordinate employees and is subject to the minimal supervision of the company's board of directors. The petitioner also provided its organizational chart, which depicts the beneficiary's position of president at the top of the hierarchy, followed by an operations manager, who is depicted as the beneficiary's direct subordinate. The level below the operations manager lists an assistant manager/attendant, whose subordinate is an attendant. The petitioner provided a job description for each of its employees, expressly stating that the beneficiary does not carry out any of the store's day-to-day operational tasks.

In a decision dated January 17, 2007, the director denied the petition, referring to the petitioner's organizational hierarchy and finding that the limited support staff, comprised primarily of part-time employees, would be unable to relieve the beneficiary from having to primarily engage in performing non-qualifying operational tasks.

On appeal, counsel asserts that the director placed undue emphasis on the beneficiary's support staff, particularly in light of Vermont Service Center's prior approval of the petitioner's previously filed nonimmigrant L-1A petition on behalf of the same beneficiary. Counsel's arguments, however, are contrary to precedent case law and, therefore, lack merit.

First, with regard to the director's consideration of the petitioner's staffing structure, federal courts have generally agreed that U.S. Citizenship and Immigration Services (USCIS) "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In the present matter, the petitioner has provided an organizational chart, attempting to illustrate a multi-tier organizational hierarchy. The petitioner also provided a separate list of employees and their respective job descriptions, explaining which duties are assigned to which employee. Based on

the job descriptions, it appears that the entire operation of the petitioner's retail store is handled by the three employees who occupy positions within the petitioner's hierarchy. However, the petitioner provides no documentary evidence to establish whom it employed as of October 2006. 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)). The petitioner's mere claim is not sufficient to establish that it had the available human resources to relieve the beneficiary from having to primarily perform non-qualifying operational tasks at the time the Form I-140 was filed. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The director duly observed the petitioner's tax return for 2006, which showed that after paying the beneficiary's salary, the petitioner could have paid no more than a total of \$26,052 to the three remaining employees. Based on the documentation submitted, it was reasonable for the director to conclude that the petitioner's staff at the time of filing was comprised of part-time employees. While counsel is correct in pointing out that the regulations do not require the beneficiary to manage full-time employees, it is reasonable for USCIS to question how the petitioner can sustain the beneficiary in a qualifying position when the petitioner's already limited support staff is comprised of part-time employees. Here, instead of offering evidence documenting the individuals who were employed by the petitioner at the time of filing, counsel merely dismisses the director's observation as being invalid, failing to recognize that the petitioner's ability to relieve the beneficiary from having to primarily perform non-qualifying job duties is directly dependant upon the availability of a support staff that is ready and able to assume those non-qualifying tasks.

Counsel's suggestion that the petitioner's approval of a previously filed nonimmigrant petition is in any way instructional to the petitioner's eligibility for the immigration benefit sought in the present matter is also without any legal basis. Contrary to counsel's assertion, USCIS is not bound to approve an I-140 immigrant petition even when a prior nonimmigrant I-129 L-1 petition was approved. See, e.g., *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Moreover, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. USCIS is not required to assume the burden of searching through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand in the present matter. In fact, if the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director and the matter should be reviewed for possible revocation. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

Counsel goes on to contend that the director uses boilerplate language without properly considering the specific facts of the matter at hand. While the AAO does not dispute the director's likely use and reuse of similar language in many different denial decisions, there is no evidence that the director

failed to consider the facts of this specific case in applying the claimed boilerplate language. It is apparent that counsel fails to consider the possibility that the director reviews large quantities of cases with issues similar to those in the present matter and that the boilerplate language to which counsel refers is applicable and relevant to more than just a few cases. Here, the AAO acknowledges the director's erroneous reference to the position of operations manager as that of vice president. However, this harmless oversight cannot lead to withdrawal of a denial, which the evidence of record supports as having been warranted. Careful reading of the director's decision reveals an analysis of the petitioner's organizational structure and documentation that indicates that the petitioner lacked the organizational complexity at the time the Form I-140 was filed to employ the beneficiary in a qualifying managerial or executive capacity.

The AAO further notes that even in those instances where the petitioner provides an adequate description of the beneficiary's daily tasks, this information must be reviewed in light of the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks. In the present matter, the petitioner has failed to provide a detailed description of the beneficiary's specific daily tasks and has offered an organizational chart illustrating a hierarchy, whose ability to support a primarily managerial or executive capacity employee is dubious at best. Put another way, the petitioner has provided no evidence to refute the director's adverse findings regarding the adequacy of the U.S. entity's organizational composition, which, based on the documentation made available to USCIS, suggests that the petitioner lacked the organizational complexity and support personnel to relieve the beneficiary from having to engage in the daily operational tasks that are required in running a retail operation.

All that being said, the petitioner in the present matter did not provide a detailed description of the beneficiary's proposed employment. Despite the director's request for a statement listing the beneficiary's specific job duties, the petitioner merely reiterated, verbatim, the laundry list of general job responsibilities as provided initially in support of the petition without conveying a meaningful understanding of exactly what specific tasks the beneficiary would carry out on a daily basis in the context of the petitioner's retail store. For instance, the petitioner indicated that the beneficiary would be in charge of hiring and firing managers. However, in the scheme of a small retail operation, it is unrealistic to claim that hiring and firing activities would be taking place on a daily or even a weekly basis. While this type of personnel activity conveys the beneficiary's degree of discretionary authority, it is not representative of a daily task.

In addition, the petitioner claimed that the beneficiary would supervise subordinates and oversee the preparation of various reports. However, the petitioner did not assign specific job duties to explain how this alleged oversight would be carried out. In other words, how does the beneficiary plan on overseeing subordinates whose task it is to work in a retail store. The AAO is equally perplexed as to the tasks involved in overseeing the creation of reports, i.e., what exactly is the beneficiary's role in the creation of sales and inventory reports or financial reports? Similarly, there is no indication as to the tasks entailed in establishing and implementing policies associated with marketing goals. The petitioner has provided no examples of any policies or goals, nor did the petitioner explain who actually carries out the marketing tasks. In other words, the AAO is entirely unable to gauge what types of activities will comprise the beneficiary's days on the job. It is noted that the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp.

1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In the present matter, not only has the petitioner failed to establish that its business can sustain a primarily managerial or executive employee, but it has failed to comply with the director's express request for a detailed statement of the beneficiary's specific job duties. Therefore, based on all of the deficiencies discussed above, this petition cannot be approved.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision.

First, 8 C.F.R. § 204.5(j)(3)(i)(B) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to his entry to the United States as a nonimmigrant to work for the same employer. In the instant matter, the petitioner's RFE response contains a letter dated September 24, 2007 in which the petitioner stated that the beneficiary's duties abroad included negotiating and negotiating with vendors; supervising subordinates in charge of marketing strategy, analyzing market conditions and sales reports, establishing and implementing policies that effect marketing goals, reviewing and approving the company's budgets, and directing the management of the company. The AAO notes that despite the director's express request for a list of the beneficiary's specific job duties, the petitioner primarily provided broad job responsibilities which fail to convey an understanding of the nature of the work performed abroad. Moreover, the only duties that were specifically listed, i.e., locating and negotiating with vendors, appear to be associated more closely with daily operational tasks rather than tasks within a managerial or executive capacity. Thus, due to the lack of sufficient relevant information, the AAO cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity as claimed.

Second, the record lacks any current documentation to establish that the petitioner is a multinational entity, which conducts business in two or more countries, one of which is the United States, through an affiliate or subsidiary. 8 C.F.R. § 204.5(j)(2). Doing business is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." *Id.* As the petitioner has not submitted documentation to establish that the foreign entity is doing business in the manner prescribed by regulation, the AAO cannot conclude that the petitioner is a multinational entity as defined above.

Third, 8 C.F.R. § 204.5(j)(3)(i)(C) states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595. In the present matter, the petitioner has provided inconsistent evidence documenting its ownership. Namely, despite its submission of stock certificate nos. 1 and 2, which transferred 700 out of a total 1,000 shares of the petitioner's stock to the foreign entity and another 300 shares to the beneficiary, respectively,

Schedule K, statement 4 of the petitioner's 2006 tax return identifies the beneficiary as 100% owner of the U.S. entity. 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 fact that the petitioner provided inconsistent documentation regarding the petitioner's ownership leads the AAO to question the overall credibility of its claimed qualifying relationship with the foreign entity.

Additionally, article five of the petitioner's articles of incorporation states that the petitioner cannot commence business until it has received consideration in the amount of or equivalent to \$1,000. However, the record lacks documentation indicating that the petitioner has received such consideration. As previously stated, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Lastly, if the petitioner is wholly owned by the beneficiary as claimed in the petitioner's latest tax return on record, the beneficiary's proposed relationship to this business indicates, more likely than not, that the beneficiary will not be an "employee" of the United States operation. As required by 8 C.F.R. § 204.5(j)(3)(C), the petitioner must establish that the prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas. See 8 C.F.R. § 204.5(j)(2) for definitions of *affiliate* and *subsidiary*. It is noted that "employer" and "employed" are not specifically defined for purposes of the Act even though these terms are used repeatedly in the context of addressing the current employment-based immigrant classification. However, 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.

Furthermore, 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.

*Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

Within the context of immigrant petitions seeking to classify the beneficiary as a multinational manager or executive, when a worker is also a partner, officer, member of a board of directors, or a major shareholder, the worker may only be defined as an "employee" if he or she is subject to the organization's "control." See *Clackamas*, 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*).

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that the beneficiary will be an "employee" employed in a managerial or executive capacity. The petitioner is a corporation, which, according to the corporate tax return discussed above, is owned and controlled by the beneficiary. There is no evidence that any other individual has any control over the work to be performed by the beneficiary.

In view of the above, it appears that the beneficiary will be a proprietor of this business and will not be an "employee" as defined above. It has not been established that the beneficiary will be "controlled" by the petitioner or that the beneficiary's employment could be terminated. To the contrary, assuming the beneficiary actually owns the petitioner as claimed in the corporate tax returns, he *is* the petitioner for all practical purposes. He will control the organization; he cannot be fired; he will report to no one; he will set the rules governing his work; 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 "employed" as an "employee."

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the

initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional grounds of ineligibility discussed above, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.

**FURTHER ORDER:** The director is hereby instructed to review the petitioner's most recently approved Form I-129 (EAC0726651919) for revocation based on grounds similar to those provided in the present matter.