

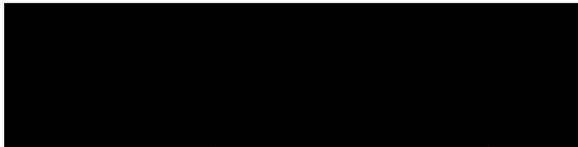
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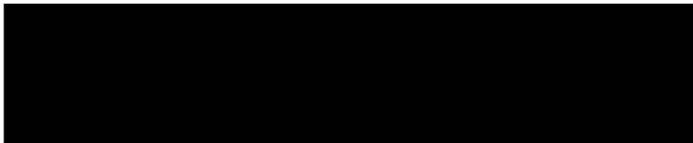
OFFICE: NEBRASKA SERVICE CENTER

Date DEC 19 2008

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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 New York corporation engaged in the business of software development. The petitioner seeks to employ the beneficiary as its chief executive officer (CEO). 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 following independent grounds of ineligibility: 1) the petitioner failed to establish that it has a qualifying relationship with a foreign entity; and 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel disputes the director's findings, asserting that the beneficiary is the sole shareholder of the U.S. and foreign entities. Counsel also claims that the beneficiary spends a majority of his time supervising a managerial staff as well as the petitioner's essential functions. Counsel's brief and all other supporting documents will be addressed in the discussion below.

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

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

\* \* \*

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

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

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

The first issue in this proceeding is whether the petitioner has a qualifying relationship with the beneficiary's foreign employer.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

*Affiliate* means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

\* \* \*

*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

*Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In support of the Form I-140, the petitioner submitted a letter dated August 2, 2006 claiming that the U.S. and foreign entities have a qualifying relationship. However, the petitioner did not specify the nature of the qualifying relationship, nor did it provide any documentation discussing the ownership of either entity.

Accordingly, the director issued a request for additional evidence (RFE) dated June 25, 2007, instructing the petitioner to define its relationship with the foreign entity. The petitioner was also instructed to provide, *inter alia*, evidence establishing ownership and control of both entities. Examples of the types of documents that would be acceptable for purposes of establishing a qualifying relationship were provided in the RFE.

In response, the petitioner provided an undated letter claiming that the foreign entity, [REDACTED], is the petitioner's sole shareholder owning 200 shares of stock. In support of this claim, the petitioner provided a photocopied stock certificate purporting to issue 200 shares of its stock to [REDACTED]. There is no indication as to the number of shares authorized for issue in the state where the purported stock issue took place, nor does it appear that the stock certificate was numbered.

After reviewing the documentation submitted, the director determined that an approval of the petition was not warranted and therefore issued an adverse decision dated February 5, 2008, concluding that the petitioner failed to establish that it has a qualifying relationship with the

beneficiary's foreign employer. The director acknowledged the petitioner's submission of a stock certificate, but noted that no other official documentation was submitted and further pointed out that the petitioner's 2005 tax return identified the beneficiary as the petitioner's sole shareholder. The director also noted that the record lacks evidence to establish who owns [REDACTED]

On appeal, counsel explains that he erroneously submitted a deficient stock certificate in response to the RFE and now submits another stock certificate along with a state corporation filing document showing that the petitioner is authorized to issue 200 shares of stock with no par value. It is noted that the petitioner provided stock certificate no. 3 on appeal without providing further explanation as to what happened to stock certificate nos. 1 and 2. That being said, 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 (BIA 1988); *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.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. It is noted that the director's RFE addressed the need for such documentation by expressly enumerating three documents that would be satisfactory for the purpose of establishing common ownership and control. The list of documents included the following: 1) an official stock ledger; 2) copies of corporate bylaws/constitutions clearly indicating stock ownership; and 3) copies of published annual reports identifying subsidiaries and/or affiliates and the percentage of ownership held by the parent entity. However, despite the director's express request, the petitioner did not provide any of these documents, relying solely on the stock certificate as evidence of ownership. Despite counsel's apparent misconception, the documentation submitted by the petitioner thus far is insufficient to establish that the beneficiary's prospective U.S. employer and his employer abroad are commonly owned and controlled. Therefore, the petitioner has failed to properly document the existence of a qualifying relationship. For this initial reason, this petition cannot be approved.

The second issue in this proceeding is whether the beneficiary would be employed 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 the petitioner's August 2, 2006 support letter, the petitioner provided the following description of the beneficiary's prospective position in the United States:

As the CEO of the petitioner, the beneficiary will have full responsibilities for the direction and coordination of activities and the operation of the company. He will be responsible for planning, formulating, and implementing administration and operational policies and procedures. The beneficiary will occupy the highest position within the company and will oversee the work of several individuals in the New York office and over 55 independent contractors working for the company on a regular basis. The beneficiary will be responsible for marketing the services of the parent

company through subordinate staff and public relations firms. He will also be responsible for identifying business opportunities in the U.S. and international [sic].

The petitioner also provided an organizational chart, which depicts the beneficiary's position of CEO as the top-most position within the U.S. entity's four-tier hierarchy. The five positions directly subordinate to the beneficiary include the marketing and sales department director, the chief of the financial department, the manager of the production department, the network administrator of the maintenance and networking department, and the coordinator of international offices (a position that the beneficiary himself occupies). With the exception of the international offices coordinator, all other departments list either contracted entities or individuals who perform the services within their given department.

In the RFE, the director informed the petitioner that the proposed job description previously submitted was insufficient and asked that a more detailed job description be provided. The director instructed the petitioner to list specific job duties and to assign an estimate of the percentage of time that would be spent performing each duty. The director also asked that the petitioner provide a description of job duties for each of the six employees listed in its organizational chart as well as copies of each individual's Form W-2 for 2006.

With regard to the beneficiary's proposed employment, the first portion of the petitioner's response was virtually identical to the statement initially provided in which the petitioner discussed the beneficiary's general responsibilities and his overall role within the petitioning entity's hierarchy. The petitioner also added the following percentage breakdown discussing how the beneficiary's time is allotted:

Among the individuals that the beneficiary is supervising are several vice presidents, marketing directors, sales directors and technical directors. The beneficiary is spending approximately 60 percent of his time working with the managerial staff of the company. He is also dedicate [sic] approximately 20% of this time to handle corporate governance issues such as personnel, finance and expansion plans. Finally[,] the beneficiary is spending approximately 20% of his time serving as liaison between the various international and national offices of the petitioner company. Thus, the beneficiary is responsible for managing not only the essential functions of the company in terms of corporate direction, but he is also responsible for managing individuals who have supervisory responsibilities. . . .

\* \* \*

[T]he beneficiary will be managing the entire organization, many essential functions of the corporation and will supervise individuals with supervisory capabilities. . . . [The beneficiary] will be both a *functional* and a *supervisory* manager as well and thus he qualifies as a manager under the regulations.

(emphasis in original).

The petitioner also provided three 2006 Form W-2s, one for the beneficiary, one for the petitioner's marketing and sales department managing director, and one for the petitioner's production

department manager. Although the petitioner provided five W-4 employee allowance withholding certificates, two of the certificates were for the year 2003. Therefore, neither document establishes that the individuals named therein were actually part of the petitioner's organizational hierarchy at the time the Form I-140 was filed.

After reviewing the petitioner's submissions, the director determined that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. The director pointed out that only three W-2 statements were submitted despite the fact that petitioner's organizational chart listed many more employees. The director also noted that the record lacks evidence that the petitioner utilizes contractors or has in-house employees to perform its daily operational tasks.

On appeal, managing director [REDACTED], on behalf of the petitioner, submits a letter dated March 6, 2008, claiming that the beneficiary supervises four employees in the New York office, another four employees who are based in Florida, and 55 independent contractors. However, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In the present matter, the petitioner has not provided documentation to support the information put forth in its organizational chart or the claims currently made on appeal. As previously noted by the director, the documentation currently on record only establishes the petitioner's employment of [REDACTED] the beneficiary, and the beneficiary's wife. There is no evidence to establish the petitioner's employment of other employees, either in-house or on a contractual basis. If the petitioner employed a total of 8 employees and 55 contractors, it is unclear why the petitioner did not provide any payroll documents, Form W-2s, or 1099 statements to establish that the individuals identified in the petitioner's organizational chart were actually performing duties or providing services for the petitioner at the time the Form I-140 was filed. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) (determining that eligibility must be established at the time the petition is filed).

[REDACTED] further asserts that the beneficiary is responsible for marketing the services offered by the petitioning entity through staff and public relations firms and for identifying business opportunities in the United States and international markets. However, the beneficiary's ability to carry out these responsibilities is based on the underlying assumption that the petitioner employs a sufficient support staff. As discussed above, the AAO cannot assume that the petitioner employs the claimed staff without documentary evidence. Thus far, the evidence submitted shows the petitioner's employment of the beneficiary and two other individuals at the time of filing. It is highly unlikely that the beneficiary would primarily perform duties within a managerial or executive capacity with a support staff of only two employees, especially given that the petitioner is claiming that a total of 63 employees and contractors are required to carry out its business operations.

Furthermore, when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The AAO will then consider this information in light of the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks. In the present matter, the record lacks a comprehensive description of the beneficiary's day-to-day tasks and does not adequately establish

the availability of support personnel who would perform the petitioner's daily operational tasks such that the beneficiary would be able to primarily focus on the performance of managerial or executive duties.

With regard to the job descriptions provided, the petitioner failed to comply with the director's request for a detailed list of specific job duties. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. Case law further emphasizes the importance of this crucial information, establishing that the actual duties themselves will 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). Merely indicating that 60% of the beneficiary's time would be spent working with the petitioner's managerial staff does not satisfy the director's request for specific job duties, as this general statement provides no insight as to the actual tasks that would be entailed in working with a managerial staff whose employment the petitioner has not properly documented. Stating that another 20% of the beneficiary's time would be spent addressing issues regarding personnel, finance, and expansion plans is equally vague, conveying no understanding of the types of underlying duties associated with these broad responsibilities.

Although [REDACTED] also claims that the beneficiary would be employed as a function manager, the record lacks the necessary evidence and information to support such a finding. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary will *manage* the function rather than *perform* the duties related to the function. In this matter, the petitioner has neither defined the essential function in specific terms, nor has the petitioner provided a specific list of job duties the beneficiary would perform in his role of function manager. As such, [REDACTED] claim is not persuasive.

In summary, the petitioner has failed to supply key information and evidence specifying how the beneficiary will spend the primary portion of his time, establishing the existence of a sufficient support staff, and explaining how their respective roles within the petitioning entity will serve to relieve the beneficiary from having to primarily perform tasks of a non-qualifying nature. It is noted that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In the present matter, given the lack of relevant information and evidence documenting the support staff that was in place as of August 2006, the petitioner has failed to establish that the petitioner was ready and able to employ the beneficiary in a primarily managerial or executive capacity at the time the Form I-140 was filed. Therefore, based on this additional ground, the AAO cannot approve the petition.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision. Namely, 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 description of the beneficiary's employment abroad is similarly lacking in the necessary information regarding the beneficiary's specific job duties. Instead, the petitioner discusses broad job responsibilities without providing more detailed information as to the actual tasks the beneficiary performed daily during his employment abroad. Therefore, the AAO cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

Lastly, given the petitioner's description of its business organization and the beneficiary's proposed relationship to this business, the AAO questions whether the beneficiary would 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. For example, 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.

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)).

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 claims to be ultimately owned and controlled by the beneficiary, who purports to assume a role as the petitioner's principal. There is no evidence that any other individual has an ownership interest or is in a position to exercise 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, the beneficiary *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.

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.