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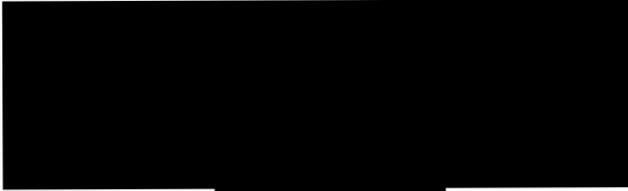
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20 Mass. Ave., N.W., Rm. 3000  
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U.S. Citizenship  
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Services

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FILE:



Office: TEXAS SERVICE CENTER Date: **MAY 21 2008**

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IN RE:

Petitioner:

Beneficiary:



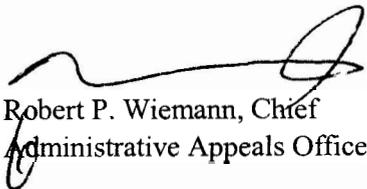
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner is a Florida corporation engaged in the business of breeding, training, purchase, and sale of thoroughbred horses. 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 on the following independent grounds of ineligibility: 1) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; 2) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; 3) the petitioner failed to establish that it had been doing business for one full year prior to filing instant Form I-140; and 4) the petitioner failed to establish that the foreign entity continues to do business.

Upon review of the petitioner's submissions, the AAO concludes that the petitioner has provided sufficient documentation to overcome the third and fourth grounds for denial. As such, this discussion will focus on the two remaining issues that address the beneficiary's employment capacity.

On appeal, counsel disputes the director's findings and submits a brief in support of his arguments.

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.

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 January 17, 2006, which includes the following description of the beneficiary's foreign and proposed positions, respectively:

From the inception of the foreign company in 1980, [the beneficiary] has been its [p]resident/[m]anaging director. As such, he has been responsible for directing its entire operations [sic]. He has been responsible for thoroughbred race horses' purchase, sale, maintenance, training, and care, and this experience is invaluable. In addition, he has the

From the inception of the foreign company in 1980, [the beneficiary] has been its [p]resident/[m]anaging director. As such, he has been responsible for directing its entire operations [sic]. He has been responsible for thoroughbred race horses' purchase, sale, maintenance, training, and care, and this experience is invaluable. In addition, he has the experience and knowledge of the foreign company's services and methods of operation, which is key to the continued success of the U.S. company.

\* \* \*

As [p]resident of the U.S. company, [the beneficiary] will direct and oversee all of the company's operations and ensure that they comply with the vision and methods set forth by the foreign company. He will develop and execute the necessary policies to effectively oversee the company's operations. He will oversee that the financial objectives are reached. Given his many years of experience and expertise, he will negotiate [the] purchase and sale of thoroughbreds, and coordinate and direct their maintenance, care and training, services that are provided by third parties . . . . He will have wide latitude in his discretionary decision-making of all company policies as his managerial skills are unquestionably exemplary . . . .

The petitioner also submitted a number of tax returns, pay stubs, and various invoices belonging to the foreign entity.

Upon review of the information and documentation submitted in support of the Form I-140 filed on January 18, 2006, the director determined that the petitioner failed to establish eligibility for the immigration benefit sought and issued a request for additional evidence (RFE) dated June, 29, 2006. The petitioner was instructed to provide additional documentation and information establishing that the beneficiary would be employed in the United States and was previously employed abroad in a qualifying managerial or executive capacity. The following documentation was requested: 1) both entities' organizational charts; 2) the beneficiary's specific day-to-day job duties and the percentage of time that was spent abroad and would be spent in the United States performing each of the job duties; 3) the job duties of each entity's employees and, with regard to the U.S. petitioner, if contractor's are used, the petitioner was asked to state the job duties of the contractor(s) and the frequency that the contractor(s) is/are used in the petitioner's business; and 4) the petitioner's quarterly payroll documents for the last quarter of 2005 and the first quarter of 2006.

In response, counsel submitted a letter dated September 19, 2006 in which he explained that the number of the petitioner's employees varies according to the number of horses in training, breeding, at race tracks, or boarded at stables. Counsel stated that some of the petitioner's employees are permanent while others are contractors and subcontractors hired to perform specific tasks for specific time periods. According to counsel and the organizational chart submitted by the petitioner, the permanent employees include the beneficiary as the company's president, whose subordinates include a racetrack director, a horse-boarding manager, and an executive administrative assistant who oversees an accountant. The chart indicates that the petitioner also hires trainers, groomers, exercise riders, and subcontractors, whose duties within the organization were not specified. Brief job descriptions were also provided as well as the number of weekly hours assigned to each of the permanent employees.

It is noted that, while the petitioner provided its 2005 tax returns as well as the W-2 wage and tax statements for 2005, it did not provide its quarterly payroll statements for either of the requested time periods. Rather, the petitioner provided its quarterly tax return for the last quarter of 2005, which showed that the petitioner

paid no wages during that quarter. The petitioner also submitted Forms W-2c and W-3c showing that it paid a total of \$15,000 in income in 2005. With regard to wages paid in 2006, the petitioner provided its quarterly tax returns for the first two quarters showing that it had three employees during each quarter. As the petitioner did not provide the requested quarterly payroll document for the first quarter of 2006, the director was unable to determine who specifically was employed at the time the Form I-140 was filed. Counsel further claimed that there were no contracts executed with the contracted employees, asserting that contracts are not required for the types of services the petitioner uses on a contractual basis.

Regarding the beneficiary's proposed employment, the following job description was provided:

[The beneficiary] oversees the horses' health and training and determines with subordinates the different plans that need to be followed with each horse, [i.e.,] either training, racing, breeding, selling . . . as well as the different racetracks where the horses would race. (30%). He also has the authority to hire and fire employees, including those contractors that will best service the business[.] (10%). He oversees [sic] that all invoices are paid in time. (5%). He meets with the accountant. (5%). He visits stables, [sic] racetracks to establish [the] well being of [the] horses as well as to take them to auctions and assist to [sic] auctions or contact owners of possible new acquisitions. (50%). In his many years in the business, [the beneficiary] has developed unique management methods, [sic] marketing strategies; [sic] other customer service related policies, as well as the financial goals he intends to achieve within a certain period of time.

With regard to the foreign entity, the petitioner provided a similar organizational chart as the one addressing the petitioning entity's hierarchy. Counsel also provided the following job description and percentage breakdown regarding the beneficiary's foreign employment:

Prior to his arrival to the United States, [the beneficiary's] duties abroad were very similar to those he is performing in the United States. [He] oversaw the horses' health and training and determined with subordinates the different plans that need[ed] to be followed with each horse, training, racing, breeding, selling, as well as the different racetracks where the horses would race. (30%). He also has [sic] had the authority to hire and fire employees, including those contractors that will best service the business (10%). He oversaw that all invoices are paid in time. (5%). He met with accountants. (5%). He visited stables [and] racetracks to establish [the] well being of [the] horses as well as to take them to auctions and assist to auctions or contact owners of possible new acquisitions. (50%).

Upon review of the submitted supporting documents, the director determined that the petitioner failed to establish its eligibility and, therefore, issued a decision dated April 24, 2007 denying the petition. The director based his conclusion on the petitioner's failure to establish that the beneficiary was employed abroad and would be employed by its prospective U.S. employer in a qualifying managerial or executive capacity. The director noted that the documentation on record does not establish that the petitioner had any employees at the time it filed the Form I-140, observing that the individuals to whom 2005 Forms W-2 were issued were not the same individuals who were named in the petitioner's organizational chart. The director also commented on the lack of documentation establishing the hiring of any contractual employees, observing that the various invoices for services rendered to the petitioner do not establish that the beneficiary would supervise the individuals rendering such services. The director determined that the petitioner failed to

establish that the reported employees for the foreign and U.S. entities are managerial, supervisory, or professional.

On appeal, counsel asserts that the petitioner provided all available tax information in response to the RFE and further states that the director's adverse comments suggesting that the petitioner failed to provide the necessary information were erroneous. Counsel points out that at the time the RFE response was provided, the petitioner's 2006 federal tax return was not yet available and that the petitioner should not be faulted for the document's unavailability or for the fact that employees' dates of employment are not included in their respective W-2 forms.

After reviewing the director's observations, the AAO finds that the director did not make the adverse finding as suggested by counsel. Rather, the director merely noted that the documentation that was submitted, which included the 2005 W-2 statements, did not establish when the various employees worked for the petitioner. While counsel properly indicated that W-2 statements do not include this information, the record contains several photocopies of pay stubs belonging to [REDACTED], which were issued by the petitioner in 2004 establishing that the petitioner employed this individual during several pay periods in 2004. Thus, the petitioner was in no way precluded from submitting comparable documentation that would establish the employment periods for its employees such as to clarify exactly whom the petitioner employed at the time the Form I-140 was filed. 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 unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Without first establishing which employees were part of the petitioner's organizational hierarchy, the AAO cannot determine with any degree of certainty that the petitioner was capable of relieving the beneficiary from primarily performing non-qualifying tasks at the time the Form I-140 was filed.

That being said, on appeal, the record has been supplement with additional documentation, which includes a number of invoices issued to the petitioner for a variety of services that are related to the boarding and care of horses. However, the petitioner has not established who was charged with hiring these service providers and overseeing that the services are adequately provided. While the petitioner's organizational chart suggests that a racetrack director and a horse-boarding manager oversee the work of contractors, the record lacks evidence to establish that either of these positions was filled when the Form I-140 was filed. The fact that the petitioner had three employees during the course of the first quarter of 2006, as shown by the quarterly tax return, does not necessarily establish that all three employees were employed in January 2006 when the petition was filed. Although the petitioner could have disclosed its number of employees during each month of the first quarter, this information was not included in the form.

In addition to establishing an organizational hierarchy capable of relieving the beneficiary from having to primarily perform non-qualifying tasks, the petitioner must also provide a detailed explanation of the beneficiary's actual daily tasks, as 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). It must be further 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, the breakdown of the beneficiary's job duties, which counsel provided in response to the RFE, establishes that 50% of the beneficiary's time abroad and in his proposed position with the U.S. petitioner has been and would be comprised of daily operational tasks including visiting stables and racetracks to monitor the horses; taking the horses to auctions as well assisting at the auctions where the horses are sold; and contacting owners in an effort to purchase more horses. While the AAO acknowledges that the beneficiary's foreign and U.S. employers claim to retain a number of contractors to actually care for the horses, the job descriptions attributed to the beneficiary suggest that he has been and would continue to carry out the tasks necessary to sell and purchase horses, which are essential revenue-generating components of both the foreign and U.S. entities. Upon review, the beneficiary's duties appear to be more akin to that of a horse trainer rather than an executive or manager. Based on this determination, the AAO cannot conclude that the beneficiary's employment abroad and his prospective employment with the U.S. petitioner consist primarily of qualifying managerial or executive level tasks. For this reason, the petition may not be approved.

Furthermore, the record does not support a finding of eligibility based on at least one additional ground that was not previously addressed in the director's decision. Specifically, given the petitioner's description of its business organization and the beneficiary's proposed relationship to this business, it appears more likely than not that the beneficiary will not be an "employee" of the United States operation. As explained in 8 C.F.R. § 204.5(j)(5), the petitioner must establish that the beneficiary will be "employed" in an executive or managerial capacity. 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 multinational executive and managerial immigrant classification. Section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C), requires beneficiaries to have been "employed" abroad and to render services to the same "employer" in the United States. Further, section 101(a)(44), 8 U.S.C. § 1101(a)(44), defines both managerial and executive capacity as an assignment within an organization in which an "employee" performs certain enumerated qualifying duties. Finally, the specific definition of "managerial capacity" in section 101(a)(44)(A), 8 U.S.C. § 1101(a)(44)(A), refers repeatedly to the supervision and control of other "employees." Neither the legacy Immigration and Naturalization Service nor CIS has defined the terms "employee," "employer," or "employed" by regulation for purposes of the multinational executive and managerial immigration classification. *See, e.g.*, 8 C.F.R. § 204.5 and 8 C.F.R. § 214.2(l). Therefore, for purposes of this immigrant 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)).

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. As explained above, the petitioner is a corporation, which the petitioner claims is ultimately owned and controlled by the beneficiary, who purports to assume a role as the petitioner's principal. While the petitioner's organizational chart names another officer within its hierarchy, there is no evidence that this 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" within one year, and the petition may not be approved for this and the other additional reasons discussed above.

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 ground of ineligibility as cited 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 she shows 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 at 1043, *aff'd*. 345 F.3d 683.

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.