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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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U.S. Citizenship  
and Immigration  
Services



FILE:

LIN 07 051 52139

Office: NEBRASKA SERVICE CENTER

Date: APR 01 2009

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.

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, 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 Maryland corporation engaged in the business of acquiring and exporting various goods to China. It seeks to employ the beneficiary as its president and chief executive officer. 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: 1) the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 2) the beneficiary would be employed in the United States in a managerial or executive capacity. In reaching these conclusions, it appears that the director relied heavily on the organizational hierarchies of each entity. That being said, the record shows that the director's observations with regard to the organizational hierarchy of the foreign entity were inaccurate. More specifically, the director observed that the foreign entity was comprised of five employees and found the foreign entity's organizational hierarchy to be lacking in complexity and, in general, incapable of having employed the beneficiary in a primarily managerial or executive capacity. A thorough review of the petitioner's supporting documents indicates that these findings were based on an erroneous determination of fact, as the submitted documentation establishes that the foreign entity was comprised of a total of 20 employees, thereby comprising a significantly more complex organizational structure than described by the director. In light of the director's error, the AAO hereby withdraws the first ground as a basis for denial. Therefore, the current decision will focus on the remaining ground as cited above.

On appeal, counsel disputes the director's conclusions 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.

The primary issue in this proceeding calls for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

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 December 1, 2006, which includes the following description of the beneficiary's proposed employment:

[The beneficiary] will continue to coordinate manpower and material planning to ensure the maximum efficiency in company operations. These functions will include business plan preparation, operational requirements, organizational structure, staffing and budgets.

[He] will continue to maintain and develop strong mutually beneficial relationships with current and potential China customers . . . . In this position, [the beneficiary] has successfully exercised sole ultimate authority to enter into binding agreements. [His] decisions are critical to the revenue sources for [the petitioner]. Further developing the company's scope of services and product offering is also included among [the beneficiary]'s duties. . . .

The petitioner also stated that the beneficiary would manage the company's three employees, which include a treasurer operations manager, a sales and services manager, and a marketing and public relations manager. The petitioner went on to say that the beneficiary will manage the company's essential function of product exportation as well as establish company goals and policies while maintaining discretionary authority over personnel and business matters.

On March 19, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide, *inter alia*, the following documentation: 1) a more detailed description of the beneficiary's proposed employment with the U.S. entity, including a percentage breakdown indicating the time allotted to each duty; 2) a more detailed organizational chart illustrating the beneficiary's position with respect to others in the company; and 3) 2005 and 2006 W-2 statements for all employees listed in the petitioner's organizational chart.

In response, the petitioner submitted a letter dated April 24, 2007 (exhibit A9, response to the RFE), in which the following supplemental description of the beneficiary's job duties was provided:

*Executive/Managerial Tasks (30% of weekly work hours)*

- Delegating specific duties to employees

- Reviewing performance of employees to determine whether salary raises and promotions are merited
- Reviewing, revising, and executing contracts, agreements, memos, proposals, etc.
- Setting monthly business goals for the company

Working as a liaison officer between this company and its [foreign parent entity]

- Setting up and adjusting corporate development ventures
- Reviewing market research and analysis and reports concerning relevant products, prices, services and trends
- Acting as authorized signatory for all contracts, agreements, and official paperwork

*Strategic and policy-related tasks (30% of weekly work hours)*

- Setting up and revising corporate policies and procedures when needed
- Implementing and enforcing policies and procedures of the company
- Setting up and adjusting organizational structure when necessary
- Review and revision of sales and marketing strategies
- Making plans to expand business into prospectively lucrative areas
- Encouraging creativity across the company
- Conferencing with subordinate management to discuss efficiency of strategies

*Negotiations and Relationships Tasks (20% of weekly work hours)*

- Initiating and establishing new business relationships with prominent U.S. firms and Chinese purchasers
- Maintaining and developing stable and long-term relationships with major distributors and suppliers
- Maintaining and developing short and long-term relationships with buyers in China
- Maintaining constant contact with top officials of suppliers and buyers in regard to pending or prospective endeavors

- Lead negotiations of business transactions and contracts
- Monitoring product performance and capabilities and satisfaction of Chinese purchasing companies
- Attending various events and conferences on behalf of the company
- Visit and inspect U.S. suppliers and distributors

*Financial responsibilities (15% of weekly work hours)*

- Review of all financial data, reports and accounting records kept by subordinate management and accountant
- Reviewing, revising and re-determining fiscal budgets for the company
- Monitoring business costs, revenues, profits, cash flows, and key financial ratios to ensure the financial health of the company
- Examining the [c]orporation's taxes, employees' insurances, pensions, commissions, bonuses and other benefits
- Meeting managers regularly to discuss financial status of the company
- Decisions regarding loans, lines of credit, etc.

*Personnel management tasks (5% of weekly work hours)*

- Deciding on hiring and dismissal of employees
- Authorizing personal leaves and vacations of employees
- Providing resources and trainings for executives and managers
- Setting the ethical tone for the company; seeing to it that the company's management regulations are duly enforced

The petitioner also provided a copy of its organizational chart depicting the beneficiary at the top of the company's hierarchy, presiding over two managerial tiers. The tier directly below the beneficiary's position includes the operations manager and the bottom tier includes a marketing and public relations manager and a sales and services manager. Despite the hierarchical structure of the managerial positions, it appears that all three managers are directly overseen by the beneficiary. As such, the AAO is unclear as to the significance of depicting the operations manager at a higher tier than the two remaining managers. Artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an

executive or managerial position. The petitioner provided 2006 W-2 wage and tax statements for each employee that was listed in its organizational chart.

In a decision dated February 21, 2008, the director concluded that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director's decision was primarily based on the petitioner's staffing composition, which the director found lacking in organizational complexity and therefore incapable of supporting the beneficiary in a managerial or executive capacity.

On appeal, counsel argues that the director placed undue emphasis on the petitioner's size. Counsel cites an unpublished decision previously issued by the AAO in support of his assertion. However, unpublished decisions are not binding on USCIS employees in the administration of the Act. Furthermore, federal courts have generally agreed that 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).

That being said, the AAO finds that the director failed to properly assess the content of the job description offered by the petitioner in response to the RFE. Accordingly, the AAO hereby withdraws the director's finding that the petitioner submitted a detailed description of the beneficiary's proposed employment and will enter a new finding accordingly.

Despite the fact that the position description provided in response to the RFE was in compliance with the request for a percentage breakdown and was longer than the description provided earlier in support of the Form I-140, a closer look at the content indicates an overall lack of a detailed account of the specific tasks that would consume the beneficiary's time on a daily basis in the context of the petitioner's current staffing composition. For instance, the petitioner indicated that a portion of executive/managerial tasks would include delegating tasks to employees and reviewing employee performances to determine the need for salary raises and promotions. However, with regard to the management of the staff members, the record does not establish that the beneficiary's subordinates are supervisory, professional, or managerial, despite the given position titles and educational credentials. The petitioner provided no information about the tasks or responsibilities of the subordinates, thereby precluding the AAO from being able to gauge their role in relieving the beneficiary from having to perform daily operational tasks. With regard to the performance evaluation of the subordinates, the AAO questions the amount of time needed to perform such evaluations given that the beneficiary has a total of three subordinates. The petitioner also stated that the beneficiary's managerial/executive tasks would include setting business goals, working as a liaison between the U.S. and foreign entities, and setting up and adjusting corporate development ventures. However, it is unclear how these broad statements translate into actual daily tasks in the context of the petitioner's import/export operation.

Similar deficiencies plague the second category—strategic and policy-related tasks—which states that the beneficiary would set up and revise corporate policies and procedures, implement those policies and procedures, make plans to expand the business, and encourage creativity. Again, these

broad job responsibilities do not represent specific tasks the beneficiary would perform on a daily basis. In other words, the petitioner does not specify any policies and procedures, nor is any information provided as to the types of plans the beneficiary would make to expand business. In fact, it would seem that every for-profit business strives to expand and become more lucrative. The petitioner must describe the specific tasks the beneficiary would perform in the grand scheme of the petitioner's business operation. Lastly, the petitioner fails to explain how encouraging creativity represents a daily task(s).

The AAO observes additional inadequacies with regard to the third category—negotiations and relationships tasks—which indicates that the beneficiary would perform operational, or non-qualifying tasks, including creating and maintaining business relationships with customers, distributors, and suppliers; leading contract negotiations; and visiting suppliers and distributors. The petitioner fails to explain how these tasks are executive or managerial. The AAO acknowledges that the beneficiary can be employed in a managerial or executive capacity even if some of his time is spent performing non-qualifying tasks. However, 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 beneficiary's job description assigns a percentage of time to general categories, thereby precluding the AAO from being able to determine just how much time would be allotted to the items that comprise each category. Moreover, the petitioner's use of broad terminology to explain how the beneficiary's time within each category would be spent precludes the AAO from being able to gauge which specific job duties would consume the beneficiary's time. While the description of job duties, despite its lack of specificity, coupled with the beneficiary's placement within the petitioner's hierarchy adequately convey the beneficiary's discretionary authority, a detailed description of the proposed daily tasks is essential, 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). The regulations expressly require that the petitioner provide a detailed description of the beneficiary's proposed job duties. *See* 8 C.F.R. § 204.5(j)(5). The purpose of this requirement is to enable USCIS to determine what the beneficiary would be doing on a day-to-day basis. The job description provided by the petitioner falls far short of establishing the beneficiary's daily activity and therefore does not meet the regulatory requirement discussed herein. Without this highly relevant and necessary information, the AAO cannot conclude that the beneficiary would be employed by the U.S. petitioner in a managerial or executive capacity. For this reason, the petition may not be approved.

Lastly, while it appears that the petitioner has overcome the documentary deficiencies with regard to its qualifying relationship with the foreign entity, further review by the AAO indicates that there is at least one additional ground of ineligibility that was not previously addressed in the director's decision. Namely, by virtue of the beneficiary's direct majority ownership of the foreign entity resulting in his indirect ownership of the U.S. petitioner, 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 U.S. Citizenship and Immigration Services (USCIS) 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 Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 449-450 (2003); *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. There is no evidence that anyone other than the beneficiary himself is in a position to exercise any control over the work to be performed by the beneficiary. As such, it appears the beneficiary is the employer for all practical purposes. He will control the organization; set the rules governing his work; and share in all profits and losses.

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 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 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.