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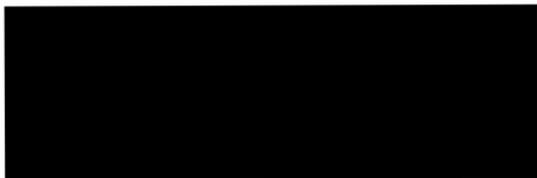
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

B4



FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER
LIN 07 154 50653

Date APR 02 2009

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:
[REDACTED]

INSTRUCTIONS:

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

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 Texas corporation operating as a gas station/convenience store. The petitioner seeks to employ the beneficiary as its president/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 it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel submits an appellate brief disputing the specific findings that led to the director's decision to deny the petition on the stated ground.

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 March 6, 2007, discussing the business operations of the beneficiary's foreign employer and the beneficiary's U.S. businesses, which includes the petitioning entity. Although the petitioner discussed the beneficiary's ownership interests in the foreign and U.S. entities as well as the beneficiary's position titles with respect to

each entity, a discussion of the beneficiary's job duties was not included in the letter. The petitioner did, however, provide its organizational chart, depicting the beneficiary at the top of the organizational hierarchy with a manager as his immediate subordinate. The bottom tier of the organization was shown to include three cashiers and three service providers whom the petitioner claimed as its independent contractors.

On August 8, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide information about its hours of operation and a weekly schedule, showing the employees working for the petitioner and their respective hours of employment. The director also asked the petitioner to provide a detailed description of the beneficiary's proposed employment, enumerating the specific job duties that would be performed and the precise actions that would be taken in order to carry out those duties. Lastly, the director requested an organizational chart of the petitioner's corporate structure accompanied by job descriptions for the employees included therein.

In response, the petitioner provided a letter dated October 26, 2007, which included an explanation of the beneficiary's investment in two U.S. businesses. Specifically, the petitioner stated that the beneficiary is the sole owner of the petitioning entity, which became the successor-in-interest of [REDACTED], another U.S. entity that was previously established by the beneficiary. The petitioner further explained that the beneficiary is the majority owner of another U.S. entity, [REDACTED]

In addition to the letter, the petitioner submitted a number of supporting documents. The AAO notes that only those documents that are relevant to the beneficiary's employment capacity in the proposed position with the U.S. entity will be discussed. Specifically, the supporting documents included the petitioner's 2007 second quarterly tax return, which showed that the petitioner employed three, or possible fewer, employees at the time the Form I-140 was filed.¹ The AAO notes that the quarterly tax return for the second quarter of 2007 does not corroborate the information provided in Part 5, No. 2 of the Form I-140, where the petitioner claimed to have nine employees.

The petitioner also provided another organizational chart, which named the same employees as were named in the chart provided earlier in support of the Form I-140, but depicted a different hierarchical structure. More specifically, while the initial chart illustrated a three-tiered staffing hierarchy where all three of the store's cashiers were depicted at the same level, the newer chart shows two cashiers at the second organizational level and the third cashier, who appears to be at the lowest, or fourth, level within the hierarchy assuming the additional title of store manager and senior cashier. It is unclear why a managerial staff member has been depicted at a lower level in the petitioner's organization than the employees he would purportedly supervise, nor is there any explanation as to why this employee's placement within the organization has been altered. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to

¹ Part 1, No. 1 of the Form 941 for the second quarter of 2007 asked the petitioner to disclose the total number of employees who received compensation during that quarter. It is noted that while the petitioner indicated that it compensated three employees during the second quarter of 2007, the AAO cannot determine whether all three employees were working for the petitioner in May 2007 when the petition was filed, as the form does not ask the petitioner to disclose the specific number of employees compensated during any specific month within the second quarter. As such, it cannot even be concluded that the petitioner had three employees at the time of filing.

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).

Lastly, the petitioner provided a list of the beneficiary's proposed job duties and the percentage of time allotted to each one. As the director has restated the description, verbatim, in his decision, the AAO need no repeat this information in the current decision.

In a decision dated March 20, 2008, the director denied the petition, concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. The director conveyed a sense of doubt regarding the beneficiary's specific role and the job duties performed to ensure business expansion in the United States and further observed that the second, sixth, and eighth duties as provided in response to the RFE contained ambiguous wording of the beneficiary's job description, thereby precluding U.S. Citizenship and Immigration Services (USCIS) from being able to determine specific tasks performed in the execution of certain duties.

In reviewing the time allotted to the duties specifically referenced by the director, the AAO observes that these account for only 35% of the beneficiary's time. As pointed out by counsel in his brief, the petitioner only needs to establish that the beneficiary will *primarily* perform tasks of a qualifying nature. 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). Therefore, if only 35% of the beneficiary's time would be spent performing non-qualifying tasks, this alone would not render the beneficiary ineligible for classification as a multinational manager or executive.

Regardless, the AAO finds that the director's conclusion was warranted and need not be disturbed. Pursuant to a thorough and comprehensive review of the petitioner's submissions, the AAO finds that the beneficiary's description of duties is problematic for reasons other than those discussed by the director. Namely, the job description provided by the petitioner is so generic and generally lacking in specific tasks that the AAO is unable to ascertain what specific tasks would be performed and whether the beneficiary's time would be primarily spent in a qualifying capacity. For instance, the petitioner allotted 15% of the beneficiary's time to making executive decisions, implanting initiatives, and developing plans to ensure maximum efficiency and minimize financial loss. However, these duties must be considered in light of the petitioner's specific business purpose, which involves the operation of a gas station/convenience store. It is unclear what executive decisions, initiatives, and plans would involve the efforts of someone in a primarily managerial or executive position on a daily basis. Similarly problematic is the petitioner's claim that 15% of the beneficiary's time would be allotted to directing and coordinating reviews of activity, operating, and sales reports. The petitioner provides no discussion as to how the beneficiary would coordinate the review of reports and why 15% of the beneficiary's time on a daily basis would be spent reviewing such reports. This job duty is not only ambiguous, but also makes no sense in the context of a gas station/convenience store petitioning to employ the beneficiary.

The petitioner allotted another 10% of the beneficiary's time to analyzing and evaluating overall staff performance. This portion of the description is problematic, as the majority of the petitioner's staff as identified in the organizational chart is comprised of non-supervisory, non-professional, and non-

managerial employees. Despite the claim that the beneficiary's immediate subordinate is a managerial employee, the petitioner has not provided sufficient evidence to establish its employment of the claimed individual at the time of filing, nor does a single managerial employee comprise the petitioner's staff, which appears to be comprised primarily of cashiers. Despite the petitioner's attempt to attach a managerial position title to one of the cashiers, as previously noted, the petitioner did not initially identify this employee as a manager and provided no explanation as to the change in the position title other than for the purpose of establishing that the beneficiary would be employed in a qualifying capacity.

Furthermore, the petitioner's Form 941 for the second quarter of 2007 indicates that the petitioner employed no more than three employees at the time the Form I-140 was filed. Aside from the fact that this information is inconsistent with the claim made in the Form I-140 itself, the petitioner has not established which positions were filled at the time of filing and whether the petitioning gas station/convenience store required and was capable of supporting an employee in a primarily managerial or executive capacity. 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)).

Thus, given the director's adverse findings regarding duties that would consume 35% of the beneficiary's time coupled with the problems noted above, the AAO finds that: 1) the petitioner has failed to justify employing the beneficiary in a primarily managerial or executive capacity; and 2) the petitioner has not provided sufficient information as to specific tasks the beneficiary would perform during at least 75% of his work week. 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).

On appeal, counsel asserts that the director imposed a heavier burden of proof than the applicable preponderance of the evidence standard. Counsel's assertion is based on an erroneous interpretation of the director's analysis, which addressed only certain job duties that would have only accounted for 35% of the beneficiary's time. According to counsel's understanding, the fact that the director's specific comments were only directed at three job duties indicates that the director did not deem the remainder of the job duties as problematic. However, a closer reading of the director's observations indicates that the director focused on the second, sixth, and eighth job duties, because he found them to be non-qualifying. The fact that specific findings were not issued with regard to the remaining job duties is not an implication that only the three cited job duties were problematic. Rather, the director generally found that the beneficiary's job description used "somewhat ambiguous wording," thereby indicating an overall lack of sufficient details regarding specific tasks and activities to be carried out on a daily basis.

While counsel finds the director's reference to the "somewhat ambiguous wording" in itself ambiguous, the regulation at 8 C.F.R. § 204.5(j)(5) is instructive and adequately conveys the importance of a detailed description of the beneficiary's job duties. In the present matter, the job description is wordy, consisting of lengthy statements that primarily use terminology that would generally be associated with an employee in a managerial or executive capacity. However, the description is so generic that it can be applied to management in any number of retail operations in a

variety of different industries. There is no indication that the general statements used to describe the beneficiary's job duties take into account the petitioner's staffing or the specific nature of the petitioner's business. Thus, counsel's objection to the director's use of the term "ambiguous" in reference to the beneficiary's job description is unfounded.

Next, counsel refers to an unpublished decision issued by the AAO in which the AAO reproached the director for employing an additional criterion that was undefined and not part of the regulatory framework. Counsel's argument fails on two grounds. First, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Unlike the "undefined and unsupported view" of the director in the unpublished case, there is no evidence that the director in the present matter used the same or similar terminology in reaching his conclusion. Contrary to the counsel's assertions, there is no evidence that the director strayed from the statutory provision, requiring the beneficiary to primarily perform job duties in a qualifying managerial or executive capacity. Second, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Lastly, counsel reiterates his contention that the beneficiary primarily performs job duties in a qualifying capacity. However, the AAO has provided a detailed analysis of the beneficiary's job description, specifically denoting the flaws that preclude withdrawal of the director's legally sound decision. While USCIS acknowledges the petitioner's compliance with the request for additional documentation and information, the mere compliance does not indicate that eligibility has been established. To the contrary, the AAO has provided a detailed discussion of the various ways in which the petitioner has fallen far short of establishing its eligibility for the immigration benefit sought. In light of the above, the AAO finds that the petitioner has failed to establish that the beneficiary would primarily perform job duties in a qualifying capacity.

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, record lacks an adequate description of the beneficiary's job duties abroad such that any determination can be made as to his employment capacity with the claimed foreign employer. Therefore, the AAO cannot conclude, based on the record as it currently stands, that the beneficiary was employed abroad in a managerial or executive capacity.

Second, by virtue of the beneficiary's claimed 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 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 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.

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.

As a final note, service records show that a new office petition (receipt no. SRC 04 141 52356), filed by a different petitioner ([REDACTED]) on behalf of the same beneficiary, was previously approved for one year. However, the first L-1A petition (receipt no. SRC 05 230 52740) for this petitioner was denied and the appeal was dismissed. Thus, counsel's brief reference to a previously approved L-1 employment of the beneficiary is irrelevant, as it does not apply to the same petitioner as the one whose Form I-140 is being reviewed in the present matter. Regardless, with regard to the beneficiary's approved L-1 nonimmigrant classification, it should be noted that, in general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by U.S. Citizenship and Immigration Services (USCIS) than nonimmigrant petitions.

In addition, 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. USCIS denies many I-140 immigrant petitions after approving prior nonimmigrant I-129 L-1 petitions. *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).

Furthermore, if the previous nonimmigrant petition for [REDACTED] were 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. 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).

Finally, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.