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U.S. Citizenship
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FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date: **APR 03 2009**
LIN 07 186 50720

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 Florida corporation seeking to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition based on two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; 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 conclusions and submits a brief in support of his assertions.

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 two primary issues in this proceeding call for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the beneficiary was employed abroad and whether he 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 May 16, 2007, which stated that the beneficiary is the foreign entity's managing director and seeks to remain in the United States as the president of the U.S. entity. Aside from providing the beneficiary's position title with the foreign entity, the support letter provided no further information as to the job duties that were performed during the beneficiary's employment abroad. With regard to the beneficiary's proposed employment, the petitioner provided an undated document titled, "L-1 Executive/Managerial Duties List," which stated that 90% of the beneficiary's time would be devoted to executive duties, while the remaining 10% would be devoted to non-executive tasks. The following description was provided:

[R]esponsible for all hiring/firing of employees; supervises operations manager in day[-]to[-]day operation of [the] company; all marketing and advertising decisions; approves final budget and [is] responsible for all banking and financial matters; represents [the] company in local and regional professionals [sic] and civic organizations and activities; prepares and executives expansion and marketing plans; approves acquisition of new business; all other executive duties as they arise.

Additionally, the petitioner provided its organizational chart, illustrating a multi-tier hierarchy with the beneficiary at the highest level as the company's president. The chart depicts a vice president as the beneficiary's immediate subordinate with a maintenance manager, an IT manager, and a website designer as her three immediate subordinates. The remainder of the chart consists of various contractors hired by the petitioner to provide a number of real estate-related services. Based on information provided in a second, more abbreviated chart, it appears that the petitioner's vice president oversees the work of the various service providers.

On August 17, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a detailed description of the specific duties performed by the beneficiary during his employment abroad as well as a similar list of specific job duties describing the proposed employment with the U.S. entity. The petitioner was asked to assign a percentage of time to each job duty to show how much of the beneficiary's time was and would be devoted to the various duties that comprised his position abroad and those duties that would comprise his U.S. position. The RFE also instructed the petitioner to provide job descriptions for the beneficiary's subordinates and independent contractors at the foreign and U.S. entities. Lastly, the petitioner was asked to provide its second quarter federal and state withholding return for 2007 as well as evidence of wages paid to individual independent contractors in 2007.

In response, counsel provided a letter dated September 10, 2007 in which he referred to a list of the beneficiary's job duties, claiming that the list would indicate that 90% of the beneficiary's time is devoted to executive job duties. It is noted that the job description referenced by counsel was the same job description that was submitted in support of the petition in the form of the undated document titled, "L-1 Executive/Managerial Duties List." The only alteration made in the document submitted in response to the RFE was that the reference to L-1 was omitted from the document's title. Counsel further stated that Susan Cook, the beneficiary's spouse and direct subordinate, serves as the company's operations manager, overseeing all daily functions as well as the company's IT manager, who is located in the United Kingdom, and the company's maintenance manager. Counsel explained that the IT manager is paid by the foreign entity.

The petitioner also provided an organizational chart similar to the chart provided initially in support of the petition. However, as discussed above, [REDACTED] position title was altered from vice president to vice president/operations manager. Although the chart showed a maintenance manager and IT manager as [REDACTED] two immediate subordinates, the website designer that was included in the prior chart was not included. The petitioner provided no explanation for the change.

Next, with regard to the request for the petitioner's tax documentation, the petitioner provided its employer's quarterly report for the second quarter of 2007, which encompasses the time period during which the Form I-140 was filed. It is noted that the only employee listed in the report was [REDACTED], the petitioner's maintenance manager.

Lastly, the petitioner provided the foreign entity's organizational chart, which depicted the beneficiary at the top of the hierarchy as the managing director, the beneficiary's wife as his subordinate in the position of director/company secretary, the office manager as her direct subordinate, and two administration assistants, one rental clerk, and contractors as the office manager's subordinates.

It is noted that the petitioner failed to provide a job description of the beneficiary's foreign employment listing specific job duties and assigning a percentage of time to each duty. The petitioner also failed to provide job descriptions of the beneficiary's subordinates and the petitioner's independent contractors. It is noted that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Additionally, while the petitioner provided a brief description of the beneficiary's proposed employment, it failed to delineate specific job duties and indicate how much time would be devoted to each job duty as requested.

The director denied the petition in a decision dated April 9, 2008, noting that the petitioner failed to specify which of the beneficiary's proposed job duties can be classified as executive in nature. The director observed that the petitioner deemed most job duties dealing with daily property maintenance as qualifying executive job duties. The director disagreed. Despite finding the job description to be overly general, the director found it to be sufficient to indicate that the beneficiary is primarily involved in handling the marketing for the U.S. entity, soliciting business, and taking care of the petitioner's banking needs. Based on this assessment, the director found that the beneficiary's proposed employment with the U.S. entity would primarily consist of non-qualifying tasks.

With regard to the beneficiary's foreign employment, the director observed that the petitioner failed to comply with the prior request for a description of job duties and therefore relied on the information provided in the beneficiary's résumé. However, the director found that the beneficiary's résumé does not specify any actual job duties and therefore fails to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

On appeal, counsel devotes a significant portion of his brief to the beneficiary's position abroad and contends that additional evidence is provided to describe the beneficiary's employment with the foreign entity. The AAO notes, however, that the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. Therefore, the AAO will not consider any new information or evidence regarding the

beneficiary's employment abroad for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director. 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). In the present matter, this crucial information was not provided, despite the director's express request. Therefore, the AAO finds that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

With regard to the beneficiary's proposed employment with the U.S. entity, counsel asserts that the director misinterpreted the petitioner's prior submissions, claiming that the beneficiary "approves all marketing and solicitation efforts, and as CEO, sets the marketing and soliciting policies of the company." Counsel also disputes the director's finding that handling the petitioner's banking constitutes a non-qualifying task, claiming that that is entailed in the property management industry. Counsel explains that due to the nature of the property management business and the large amounts of money involved in the various transactions, the beneficiary prefers to handle the petitioner's banking. Counsel also claims that the beneficiary is required to promote the business through "executive level networking." 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). Despite the cash transactions and the fiduciary duty the beneficiary feels he owes his clientele, counsel has not explained why the daily handling of banking transactions should be deemed a qualifying task. Furthermore, with regard to the beneficiary's marketing tasks, the needs of the petitioning entity do not relieve the petitioner from the burden of having to establish that the majority of the beneficiary's time would be spent performing qualifying tasks.

Lastly, counsel claims that the petitioner has provided a breakdown of the beneficiary's job duties accompanied by an assigned percentage of time to be spent on each duty. However, counsel's statement is not an accurate depiction of what was, in fact, submitted. Specifically, the petitioner provided a combined list of twenty job duties and responsibilities. However, a time allocation was not assigned to any of the items on the list. Rather, the petitioner attached a rather confusing color wheel, which divided the beneficiary's position into seven main categories, each of which was assigned the percentage of time the beneficiary would devote to the items pertaining to that category. It is noted, however, that there is no clarification as to which of the individual job duties and responsibilities correspond to the categories listed on the color wheel.

Moreover, even if the petitioner were to have grouped the job duties and responsibilities according to the corresponding category, there is no indication as to the portion of time that would be devoted to the specific job duties and responsibilities, many of which cannot be deemed as qualifying. For instance, the list of items includes researching and developing software, identifying new business opportunities, creating and developing business relationships, attending monthly manager association meetings to network and identify business opportunities, and balancing the petitioner's accounts. As none of these items can be deemed as qualifying, the petitioner must somehow establish that, cumulatively, they would not comprise the primary portion of the beneficiary's time. The petitioner has not done this. Furthermore, the list included the following items, whose

qualifying capacity could not be determined: establish the petitioner's strategies and objectives; direct and evaluate the operational manager's performance; and direct and guide the operational manager. The AAO finds these items to be overly broad and requiring clarification as to the specific underlying job duties that would be performed. Precedent case law has firmly established the need for specifics when describing the beneficiary's employment, as it is the actual duties themselves that 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). As the above items fail to specify actual tasks, it is unclear whether those items would fall under the definition of managerial or executive capacity.

In summary, the petitioner has failed to submit sufficient evidence and information establishing that the beneficiary was employed abroad and that he would be employed in the United States in a qualifying managerial or executive capacity. Based on the AAO's findings as discussed above, this petition cannot be approved.

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

First, 8 C.F.R. § 204.5(j)(3)(i)(C) states that the petitioner must establish that it 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.

Additionally, case law confirms 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.

In the present matter, the petitioner claims to have an affiliate relationship with the beneficiary's foreign employer based on the claim that the beneficiary and his wife, together, own both entities. With regard to the foreign entity, the petitioner provided two stock certificates showing that the beneficiary and his wife each own one share of the company, thereby indicating 50/50 ownership. In support of the U.S. entity's ownership, the petitioner provided a stock certificate, which indicates that the beneficiary and his wife own 100,000 shares of the petitioning entity as tenants by the entirety. However, the validity of the stock certificate is questionable due to the petitioner's use of the legal term "tenancy by the entirety." First, there is no evidence that tenancy by the entirety is a legal principal that is accepted in the State of Florida, where the petitioner was incorporated. Second, even if tenancy by the entirety is accepted in Florida, the petitioner's stock is not real property to which the term tenancy by the entirety is generally applied. There is no evidence that this term can be applied to the petitioner's stock. 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)).

Moreover, even if the petitioner's stock certificate is valid, the term tenancy by the entirety does not indicate the number of shares owned by the beneficiary. Without this highly relevant information, United States Citizenship and Immigration Services (USCIS) cannot determine whether the beneficiary and his wife each owns 50% of the U.S. entity as is the ownership scheme of the foreign entity. In other words, it is not clear that the beneficiary has a similar ownership interest in the U.S. and foreign entities.

That being said, Schedule K of the petitioner's 2006 federal tax return identifies the beneficiary as the 100% owner of the U.S. entity. This information is problematic for two reasons. First, this information is inconsistent with the petitioner's prior claims and its stock certificate, all of which indicate some form of joint ownership of the petitioner by the beneficiary and his wife. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Second, if the beneficiary is the majority owner 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, according to the petitioner's stock certificate, is ultimately owned and controlled by the beneficiary, who purports to assume a role as the petitioner's principal. There is insufficient evidence to establish 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 grounds of ineligibility discussed above, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 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.