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U.S. Citizenship
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Services

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By

FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date: **APR 30 2009**
LIN 07 174 50346

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: SELF-REPRESENTED

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 limited liability company that seeks to employ the beneficiary as its general manager. 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 three independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; and 3) the petitioner failed to establish its ability to pay the beneficiary's proffered wage.

The AAO has conducted its own independent review of the record of proceeding and finds that there was no basis for finding that the petitioner lacks the ability to pay the wage offered. More specifically, the director's reliance on the petitioner's financial information from 2006 was erroneous as the Form I-140 was not filed until May 31, 2007 and the petitioner is under no burden to establish its ability to remunerate the beneficiary the proffered wage prior to the filing of the petition. The relevant documentation reflecting the wages paid to the beneficiary in 2007 indicates that the petitioner did in fact pay the beneficiary's proffered wage, thereby establishing its ability to pay in accordance with 8 C.F.R. § 204.5(g)(2). Therefore, the AAO hereby withdraws the third ground as a basis for denial and will address the two remaining grounds in the present decision.

On appeal, the petitioner disputes the director's denial and provides a brief in an attempt to overcome the three grounds stated as the basis for the director's decision. A full discussion of the director's findings and the petitioner's support evidence and information is provided below.

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

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

* * *

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

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

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

The 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 22, 2007 in which it provided the names and position titles of the employees that comprised its organizational hierarchy at the time the petition was filed. The petitioner listed the following personnel: the beneficiary as general manager; [REDACTED] as assistant manager; [REDACTED] as store manager and make-up artist; [REDACTED], and [REDACTED] as tattoo artists; and [REDACTED] as a customer service employee. The organizational chart that was among the submitted supporting documents showed the beneficiary at the top of the hierarchy, the assistant manager as his direct subordinate, the store manager/make-up artist as the assistant manager's direct subordinate, and four tattoo artists and a customer service employee as the store manager's subordinates.

The petitioner also provided the following description of the beneficiary's proposed employment with the U.S. entity:

The beneficiary . . . is responsible for the further development of the U.S. affiliate/petitioner business in South Florida. As [g]eneral [m]anager, he directly supervises the work of the [a]ssistant [m]anager, the [s]tore[']s [m]anager, a [c]ustomer [s]ervice [employee] and [a]rtists.

* * *

The beneficiary . . . is responsible for the development of the new office/studios, the affiliate/petitioner business in South Florida. As [g]eneral [m]anager, he is responsible for establishing contacts with local suppliers in the United States in order to assess the viability and profitability of these contracts, review and promote the business by advertising, direct professional personnel to assist the beneficiary on obtaining the U.S. subsidiary's goals. He has the unfettered decision making authority in this regard, as well as how to expend company funds to further establish the business and expand into other geographical areas.

Although the petitioner mentioned the beneficiary's 12-year career and academic training abroad, a description of his duties with the foreign entity was not provided.

On September 14, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide detailed job descriptions listing the specific job duties the beneficiary

performed abroad and would perform in his proposed position with the U.S. entity, as well as the percentage of time allocated to each job duty. The petitioner was instructed to provide similar job descriptions and percentage breakdowns for any supervisory staff at the foreign and U.S. entities.

In response, the petitioner provided two virtually identical percentage breakdowns describing the beneficiary's employment abroad and in the United States. The director has included the beneficiary's foreign job description in the denial. As previously stated, the job descriptions for the beneficiary's foreign and U.S. employment are virtually identical, with the exception of the verb tense used to describe the two positions. As such, the AAO finds it unnecessary to repeat either of the percentage breakdowns in the current decision.

The petitioner also provided copies of several of its quarterly wage reports, including one for the second quarter of 2007 during which the Form I-140 was filed. It is noted that this document lists a total of three employees, including the beneficiary, the assistant manager, and [REDACTED] who had not been previously named as one of the petitioner's employees at the time of filing.

In a decision dated May 28, 2008, the director denied the petition. With regard to the beneficiary's employment abroad, the director found that while the beneficiary may not have been providing tattoos and piercings for customers, he appears to have been primarily engaged in operational tasks, including training employees and performing sales and marketing duties.

With regard to the beneficiary's proposed U.S. employment, the director found that, given the size and scope of its business activity, the petitioner does not require an individual who would be primarily employed in a managerial or executive capacity.

On appeal, the petitioner addresses key findings issued by the director, asserting that the director's decision was erroneous. First, the petitioner disagrees with the director's finding that the petitioner failed to assign a percentage of time to each of the beneficiary's proposed job duties, arguing that 30% of the beneficiary's time was spent making discretionary decisions associated with sales and marketing rather than actually performing sales and marketing duties. The petitioner offers confusing statements in support of this argument, seemingly stating that the beneficiary's involvement in the sales function was limited to setting guidelines for contracts and establishing business relationships, while his involvement with the marketing function involved supervising the implementation of marketing programs and making decisions as to the types of marketing strategies that would be used to promote the business. The petitioner claimed that the foreign entity had a sufficient staff to carry out the marketing functions. However, a review of the foreign entity's organizational chart does not identify any sales or marketing employees, nor is there a separate statement clarifying the foreign entity's daily operational tasks, who performed them, and which non-operational, i.e., qualifying tasks, were left for the beneficiary to perform. 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).

Contrary to the petitioner's assertions, the beneficiary's foreign job description was overly broad, despite the petitioner's attempt to quantify the beneficiary's time allocation. The petitioner merely reiterates that the beneficiary established contacts and relationships with suppliers, but failed to specify actual daily job duties associated with the sales function. With regard to the marketing function, the petitioner claims that the beneficiary would select the appropriate marketing strategy and supervise the implementation of marketing programs. However, this explanation is similarly lacking in specific job duties that describe exactly how the beneficiary supervised implementation of a particular marketing strategy. Moreover, there is no clarification as to who actually implemented the selected marketing strategy.

While the AAO acknowledges that the sales and marketing-related tasks consumed only 30% of the beneficiary's time, the job description is equally as ambiguous as to the supervisory tasks that purportedly consumed another 50% of the beneficiary's time. In relation to his supervisory role, the petitioner merely stated that the beneficiary had the authority to hire and fire all staff as well as train the staff that performed customer service and artistic tasks. With regard to the latter, the petitioner failed to explain how the training of non-professional staff can be qualified as managerial or executive-level tasks. It therefore appears that at least a portion of the beneficiary's time spent performing supervisory duties is allotted to non-qualifying tasks. As the job description generally lacks sufficient detail, it is unclear how the beneficiary spent the primary portion of his time and whether that time encompassed primarily managerial or executive-level tasks.

As previously stated, the petitioner's description of the beneficiary's proposed employment with the U.S. entity is nearly identical to the description of the foreign employment. Therefore, the above analysis can be similarly applied to the beneficiary's prospective position with the petitioning entity. Despite the petitioner's adamant assertions that a detailed job description has been provided, the record simply does not corroborate this claim. 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)). Additionally, the petitioner's focus on its increased income from the 2006 to the 2007 tax years is misplaced, as the financial growth of an entity in no way indicates that entity's ability to employ the beneficiary in a qualifying managerial or executive capacity. While the petitioner further asserts that its support staff has grown to 15 people since 2007, eligibility must be established at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In the present matter, the record contains the petitioner's second quarterly wage report, which shows a total of three employees receiving what appear to be part-time salaries.

Additionally, while the petitioner provided an organizational chart in response to the RFE identifying a total of 16 employees, it named only eight employees in the supporting statement and in Part 5 No. 2 of the Form I-140 the petitioner claimed only seven employees at the time of filing. 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). In the present matter, the record is not self-explanatory and the petitioner does not acknowledge or resolve the inconsistency with regard to its staffing at the

time of filing. The AAO further notes that, while the petitioner provided a number of Forms 1099 showing miscellaneous income paid in 2007, two of the individuals who were initially listed as employees are not among those to whom the Forms 1099 were issued. Additionally, the AAO found more inconsistencies when conducting a comparison of the more recent of the petitioner's organizational charts with the Forms 1099. Namely, a number of Forms 1099 were issued to individuals whose names do not appear on either of the petitioner's organizational charts, while other individuals, who were listed in one or both of the organizational charts, do not appear to have received a Form 1099 or a Form W-2. This lack of clarity precludes the AAO from being able to gauge the petitioner's need and ability to employ the beneficiary in a primarily managerial or executive capacity. Thus, in light of the deficient job descriptions that have been provided for the beneficiary's foreign and proposed employment coupled with the inconsistent documentation regarding the petitioner's organizational hierarchy at the time of filing, the AAO finds that the petitioner failed to establish that the beneficiary was employed abroad or that he would be employed in the United States in a qualifying managerial or executive capacity.

Furthermore, the AAO finds 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 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 U.S. Citizenship and Immigration Services 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 limited liability company, which the petitioner claims is ultimately owned and controlled by the beneficiary, who purports to assume a role as the petitioner's principal. 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 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.