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FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date:
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AUG 10 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 New York 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 three independent grounds of ineligibility: 1) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer; 2) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 3) 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 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 first issue in this proceeding is whether the petitioner 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.

In support of the Form I-140, the petitioner provided a copy of its stock certificate issuing all 200 authorized shares to the beneficiary. No evidence was submitted establishing how much, if any, of the foreign entity is owned by the beneficiary.

On February 7, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide documentation establishing that the beneficiary's foreign and U.S. employers share common ownership and control. The director acknowledged that the submitted stock certificate indicates that the beneficiary owns a majority of the U.S. entity's shares. However, the director explained that in order to establish that a qualifying relationship exists, the petitioner must establish that the beneficiary owns a majority of the foreign entity's shares as well.

In response, the petitioner provided a letter from a partner at a foreign accounting firm, specifying the beneficiary's ownership interests in various business enterprises, including his foreign employer, which, according to the accountant, is 100% owned by the beneficiary. The petitioner also provided shareholder lists for several of the foreign companies in which the beneficiary has an ownership interest. Additionally, the petitioner provided copies of articles of association and minutes of meetings held for various companies in which the beneficiary currently has an interest. It is noted, however, that neither the shareholder lists nor minutes of meetings were submitted for the beneficiary's foreign employer in which the beneficiary also purportedly has an ownership interest.

On July 30, 2008, the director issued a decision denying the petition and basing the decision, in part, on the petitioner's failure to provide sufficient documentation in order to establish the existence of a qualifying relationship with the foreign entity. In support of his decision, the director cited only a partial list of the companies that were listed in the accountant's letter, failing to include the beneficiary's foreign employer among the list of companies in which the beneficiary purportedly has an ownership interest.

On appeal, counsel asserts that the director's recitation of the list included in the accountant's letter erroneously omitted the beneficiary's claimed ownership in the foreign entity where the beneficiary had been previously employed.

After reviewing the documentation, some of which was resubmitted on appeal, the AAO finds that the director's assessment of the supporting documents was erroneous, as pointed out by counsel. Notwithstanding the director's error, however, the director's ultimate finding that a qualifying relationship has not been established was correct. Contrary to counsel's belief, the mere statements of the beneficiary's foreign accountant, who repeated the petitioner's claim with regard to the beneficiary's ownership in the foreign entity that previously employed him, are not supported by documentary evidence, which is necessary to support the claims being made. *See 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)). It is unclear why the petitioner deemed it necessary to submit documentation establishing the beneficiary's ownership in entities that are entirely unrelated to the qualifying relationship claim being made in the present matter, but failed to submit similar documentation with regard to the beneficiary's foreign employer. When issuing the RFE, the director was sufficiently clear in explaining which documents would be sufficient in establishing the requisite qualifying relationship. The director was also sufficiently clear in limiting the submission of documents to "the foreign business entity which employs or employed the alien." Given the director's explicit instructions, there should have been no question as to which company's ownership the petitioner should be trying to establish. As such, the reason for petitioner's apparent confusion as to the necessary documents is unclear.

Furthermore, the regulation and case law confirm 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 has failed to provide adequate objective documentation establishing that the beneficiary is the majority owner of the foreign entity such that the U.S. and foreign employers can be deemed as being similarly owned and controlled. As the petitioner has failed to meet the provisions set out in 8 C.F.R. § 204.5(j)(3)(i)(B), this serves as the initial basis for denial.

The next two 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.

The petitioner did not provide a description of the beneficiary's job duties with the foreign entity or with the prospective U.S. employer at the time of filing the Form I-140. At Part 6, Item 3 of the Form I-140, the petitioner merely stated that the beneficiary would have "full charge of the business[.]"

Accordingly, the director addressed these deficiencies in the RFE, instructing the petitioner to provide a detailed list of the specific job duties that were performed by the beneficiary during his employment with the foreign entity as well as the job duties that he would be expected to perform in his proffered position with the U.S. entity. The petitioner was asked to indicate the percentage of time that was attributed to each job duty abroad and that would be attributed to each of the proposed job duties in the United States. Additionally, the petitioner was asked to provide an organizational chart for each entity and to include the beneficiary's position within each entity's organizational hierarchy.

In response, the petitioner provided an undated letter claiming that the beneficiary spends approximately 45-50 hours per week on executive job duties and approximately 3-5 hours on non-executive functions. The petitioner also provided the following list of the beneficiary's proposed job responsibilities:

- Help steer the company through an exciting growth phase and manage the entire change/organizational development process.
- Lead workforce planning and recruit for all open positions.
- Develop attractive, efficient compensation programs and structure to ensure internal and external competitiveness. Assist [f]inance with stock option administration and incentive bonus plans.
- Develop career paths for all positions and specific training and development programs to ensure our employee resources are maximized and reaching their full potential. Plan and develop appropriate management training programs and executive teambuilding to take our leaders to the next level.
- Provide employee relations support and guidance to employees and managers.
- Administer and plan benefits strategy for the entire company.
- Ensure legal compliance with all local, state and federal labor laws.
- Fully train and develop managers and supervisors for management positions.
- Establish sales goals.
- Control cash and inventory through effective management[.]

The petitioner also provided an organizational chart of the hospitality and retail businesses it currently owns, showing the individuals that supervise each operation as well as the individuals that perform the daily operational tasks of each business. The hospitality business is shown as having a full-time vice president, a full-time golf coordinator, a part-time desk clerk, and a full-time desk manager. The convenience store and gas station is shown as having a full-time assistant manager, cashier/supervisor, cashier, and deli head, and a part-time deli/cashier and a cashier. While the petitioner provided a chart of the foreign group of companies in which the beneficiary is claimed as having ownership interest, and while the chart includes the beneficiary's foreign employer, the relevant information regarding that entity's organizational hierarchy was not provided.

After reviewing the evidence submitted, the director concluded 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. The director observed that the petitioner failed to respond to the request for evidence regarding the beneficiary's position abroad. With regard to the beneficiary's proposed position, the director found that the description provided lacked sufficient detail to explain the specific tasks the beneficiary would be expected to perform on a daily basis.

On appeal, counsel disputes the director's finding that the petitioner failed to provide requested evidence and information regarding the beneficiary's employment abroad, arguing that the RFE only requested information regarding the beneficiary's proposed employment, not the beneficiary's foreign employment.

Proper review of the RFE, however, shows that counsel's argument is not persuasive and contrary to the evidence on record. Specifically, the second paragraph on the second page of the RFE expressly states, "Also submit all of the following documentation for each of the positions the beneficiary formerly held with the related foreign business entity" Directly following this statement, the director listed four separate prongs; each listing specific information and/or documentation the petitioner was expected to submit, clearly indicating that each prong applied to both the beneficiary's proposed position and to his former employment with the foreign entity. The first prong expressly requested the petitioner to provide specific lists of job duties and a percentage of time "the beneficiary will spend or spent performing each duty." The second prong asked the petitioner to discuss the number of employees "will/did the beneficiary supervise," which is also sufficient to inform the petitioner that the request applies to the foreign and proposed employment, not just to one or the other. Thus, counsel's assertion that the director abused his discretion by basing the denial on an issue that was not previously addressed in the RFE is entirely without merit. Moreover, the provisions of 8 C.F.R. § 103.2(b)(8)(ii) expressly permit the director to use/his discretion in determining whether an RFE will be issued for missing initial evidence or whether the petition will be denied outright. Thus, even if the issue of the beneficiary's foreign employment had not been addressed in the RFE, the director would not have been precluded from including this issue as a basis for denying the petition.

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). In the present matter, the director properly determined that the petitioner failed to provide requested information regarding the beneficiary's employment abroad. Therefore, the director was correct to base the denial, in part, on the petitioner's failure to provide the requested information.

With regard to the beneficiary's proposed position, counsel asserts that the director relied entirely on a "punch list," which was provided at the top of a flow chart containing brief descriptions of the duties and responsibilities carried out by the employees who work at each of the petitioner's hospitality and retail operations. Counsel points out that there were several other pages of job descriptions, which the director did not cite or discuss in the denial. While the AAO acknowledges the petitioner's submission of multiple job descriptions, none of the submissions were in compliance with the RFE in which the director expressly instructed the petitioner to list the specific job duties the beneficiary would be expected to perform in his proposed position as well as the percentage of time each job duty would consume. Regardless of which of the beneficiary's proposed job descriptions the director was to analyze, none included the specificity that was expressly requested.

All three job descriptions were equally general, focusing primarily on broad job responsibilities rather than specific daily tasks. For instance, despite the petitioner's claim that 45-50 hours per week would be spent performing executive functions and another 3-5 hours per week would be spent performing non-qualifying functions, the AAO has no way of distinguishing between the executive and non-executive functions, as the job description is entirely devoid of any specific information as to the beneficiary's actual daily tasks, which are necessary to 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). For instance, the petitioner claimed that the beneficiary will "steer" the company through progressive stages of development. The description also states that the beneficiary would lead the workforce, including developing career paths for company employees, planning management training programs, providing employee relations support, and providing a benefits strategy. While this list adequately conveys the heightened level of the beneficiary's discretionary authority, it fails to explain exactly what specific job duties the beneficiary would perform on a daily basis in his effort to carry out his general job responsibilities and meet his broad business objectives.

Counsel further explains that the petitioner currently employs a vice president, a 49% minority shareholder,¹ who is responsible for the daily operation of the petitioner's hospitality business. Counsel goes on to discuss the employee structure within that business as well as the food mart and gas station operation, which is claimed to have six employees. However, this information does not help explain what the beneficiary does on a daily basis. It is noted that the AAO cannot assume that the beneficiary primarily performs tasks of a qualifying nature simply because the petitioner employs a staff to operate each of its two business locations. Moreover, the record lacks actual documentation to establish that the employees identified in counsel's brief are and were actually employed by the petitioner at the time of filing. Without documentary evidence to support the claim,

¹ It is noted that, according to the stock certificate initially submitted in support of the petition, the beneficiary is the petitioner's sole stockholder. The claim that there is another individual who owns 49% of the petitioner's stock is directly inconsistent with the information conveyed through the stock certificate. 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). While the AAO has determined that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer, this determination was based on the petitioner's failure to provide evidence establishing who owns and controls the foreign entity. The inconsistency described herein further contributes to the AAO's ultimate determination regarding the issue of a qualifying relationship.

the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In summary, the petitioner has failed to provide sufficient information about the specific tasks the beneficiary would perform on a daily basis such as to expand on the broad job responsibilities that have been provided thus far. The beneficiary fills the top-most position within the petitioner's organizational hierarchy and exercises considerable discretion over all business matters, but that does not establish the nature of the specific duties the beneficiary would perform within the organizational hierarchy that was in place at the time of filing the petition. Despite the director's express request for a detailed description of the beneficiary's day-to-day job duties and despite the fact that the director's subsequent denial was based, in part, on the petitioner's failure to provide the requested information, counsel has not rectified this significant deficiency.

Additionally, while not expressly addressed in the director's decision, by virtue of the beneficiary's claimed ownership of the U.S. petitioner, regardless of whether he is the sole shareholder or merely owns a majority of the petitioner's shares, 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. The beneficiary therefore seeks to enter the United States to be an entrepreneur, rather than "to continue to render services to the same employer or to a subsidiary or affiliate" of his previous foreign employer.

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.