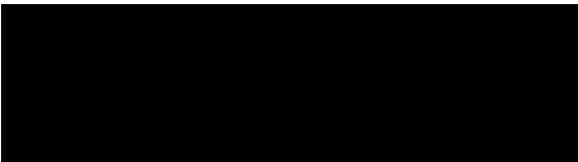




U.S. Citizenship
and Immigration
Services

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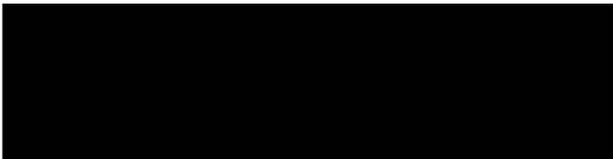
FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER
LIN 07 101 51746

Date: DEC 03 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:



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).


Perry Rhew
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 organized in the State of Florida. It seeks 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 on the basis of three independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary would be an employee of the U.S. entity; 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 that the foreign entity continues to operate and do business. After reviewing the record in its entirety, the AAO concludes that the petitioner has submitted sufficient evidence to establish that the foreign entity continues to operate and do business. Therefore, the AAO hereby withdraws the third ground as a basis for denial and will limit this decision to the two remaining grounds for denial.

On appeal, counsel disputes the director's conclusions and submits a brief and additional evidence 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 beneficiary would be an employee at the U.S. entity. 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*).

The director applied the *Darden* and *Clackamas* tests to this matter in the request for evidence (RFE), dated July 28, 2008, in which the petitioner was instructed to answer the first five of the above six queries posed as in *Clackamas*. *Id.* In reviewing the petitioner's response, which included a letter from counsel dated August 21, 2008, it appears that the RFE instructions were misconstrued, as counsel continued to address the issue of whether or not the beneficiary would be employed in a qualifying managerial or executive capacity. Nevertheless, in addressing the issue of the beneficiary's employment capacity, counsel provided information indicating that the beneficiary has absolute discretion over the hiring and firing of personnel as well as over all issues concerning the petitioner's daily operation. After considering this information regarding the beneficiary's discretionary authority in light of the beneficiary's sole ownership of the petitioning entity, the director properly concluded that the beneficiary would not be an employee of the petitioner in the sense that she would not be subject to the control of an authority figure higher than herself.

On appeal, counsel asserts that the beneficiary's sole ownership of the petitioning entity does not disqualify the beneficiary from classification as a multinational manager or executive. Counsel applies corporate law principles in asserting that, unlike a sole proprietorship, the petitioner in the present matter is an entity that is separate from the individual who owns it. While counsel's legal interpretation is correct in the corporate law context, in the immigration law context, the issue of who controls the work of the beneficiary is key to determining whether she can truly be deemed an "employee" of the entity, which she both owns and controls in her role as the petitioner's principal. There is no evidence that anyone other than the beneficiary herself 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. She will control the organization; set the rules governing her work; and share in all profits and losses. Therefore, 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. On the basis of this initial finding, the instant petition cannot be approved.

The second issue in this proceeding is whether the petitioner would employ the beneficiary 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 January 26, 2007, which includes the following description of the beneficiary's proposed employment with the U.S. entity:

The duties of this executive and managerial position include executive responsibility for all financial and management analysis activities. [The beneficiary] will be responsible for planning, developing, and establishing policies and objectives of the business organization in accordance with the board's directives and the corporation charter. She will confer with the overseas company officials to plan business objectives, develop organizational policies, and establish responsibilities and procedures for attaining our company's objectives. She will be responsible for conducting management studies and analyzing financial reports on operations;

collecting and interpreting economic and statistical data to prepare budget estimates; determining work load, personnel, and equipment requirements, and to [sic] forecast future needs; and monitoring the supervision of all employees to make sure company procedures and all local, state, and federal laws are being followed, adjustments due to tax and other financial reasons; and performing research and analyses relative to losses and adverse financial trends and suggesting remedial measures.

In response to the director's RFE, which was issued on July 28, 2008, the petitioner provided an undated letter from its vice president, who provided the following percentage breakdown describing the beneficiary's proposed employment in the United States:

[The beneficiary] spends 25% of her time directing and coordinating functions and responsibilities of the company to attain objectives, and to maximize returns on investments and productivity; 20% of her time directing and formulating financial programs, relations with customers, suppliers and distributors; 15% of her time directing the financial management of the company; 15% of her time developing new business and preparing the company's expansion into the United States; 7.5% of her time conducting management studies and analyzing financial reports on operations; 7.5% of her time collecting and interpreting economic and statistical data to prepare budget estimates; 5% of her time determining work load, personnel and equipment requirements and to forecast [the] future[;] and 5% of her time monitoring to make sure company procedures and laws are being followed.

The petitioner's response also included an organizational chart, which depicts the petitioner as a four-tiered organization headed by the beneficiary in the position of president; the company's vice president is shown as the beneficiary's direct subordinate; and a financial manager is depicted at the third tier within the hierarchy. The bottom tier of the hierarchy is comprised of two sales representatives—one representing Florida customers and the other representing New York customers—and one employee in the purchasing department.

Additionally, the petitioner provided its 2007 first quarterly wage report, which names the six individuals listed in the organizational chart. The employee salaries shown in the wage report indicate that three of the petitioner's employees were employed on a full-time and three were employed on a part-time basis at the time the Form I-140 was filed.

In a decision dated October 31, 2008, the director denied the petition noting that, based on the salaries shown in the relevant quarterly wage report, the petitioner's sales and purchasing staff was comprised of part-time employees. The director also considered the low level of complexity in the petitioner's organizational hierarchy and observed that the record lacked evidence to establish that the beneficiary would oversee the work of a professional, managerial, or supervisory staff. Additionally, the director made adverse findings regarding the beneficiary's salary and the vice president's personal relationship with the beneficiary.

With regard to the two latter adverse findings, the AAO notes that neither the beneficiary's salary nor her relationship with another employee within the petitioning entity is relevant to the overall issue of the petitioner's eligibility or the more narrow issue of the beneficiary's employment capacity within the petitioning entity. So long as the petitioner is able to establish its ability to pay the beneficiary's proffered wage and to employ the beneficiary in a primarily managerial or executive capacity, USCIS cannot deny a

petition on the basis of an arbitrary determination of the beneficiary's wages. The same is true of the director's adverse comments regarding the beneficiary's relationship with the petitioner's vice president, which in itself, does not adversely impact the petitioner's claim.

On appeal, counsel challenges the director's adverse comment with regard to the number of part-time staff the petitioner employed at the time of filing, asserting that there is no requirement that the petitioner employ a full-time staff. While counsel's statement is correct, the AAO notes that the petitioner assumes the burden of having to establish that it has the ability to relieve the beneficiary from having to primarily perform non-qualifying tasks. In determining whether or not the petitioner is able to employ the beneficiary in a qualifying managerial or executive capacity under the given circumstances at the time of filing, the adequacy of the petitioner's support staff is one of the main factors that can and should be considered. *See Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)).

In the present matter, the director was correct to question the sufficiency of a support staff that is comprised, in large part, of part-time employees. While USCIS cannot automatically rule out the possibility that the beneficiary would be employed in a qualifying capacity under the given circumstances, further discussion and documentation is necessary to meet the burden of proof. 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)). Counsel's claim that the petitioner currently employs four full-time managers is not sufficient. First, at the time the Form I-140 was filed the petitioner employed three, not four, full-time managers, one of whom was the beneficiary herself. Second, where the primary source of revenue generation is the sale of medical equipment, the petitioner must establish that the two part-time sales people it employed at the time the Form I-140 was filed were sufficient to relieve the beneficiary from having to spend the majority of her time engaged in sales or other operational tasks.

Furthermore, the petitioner must establish that the beneficiary is relieved from having to primarily perform other daily operational tasks, including various administrative and office management job duties. In the present matter, the petitioner's organizational chart does not indicate that the petitioner employed any administrative employees at the time of filing, as the organization was comprised of three managers and three part-time sales and purchase employees. It is unclear who within the petitioner's hierarchy was carrying out the daily office tasks.

Additionally, in examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant matter, the description of the beneficiary's job duties is too general to convey a meaningful understanding of exactly what the beneficiary will be doing on a daily basis and how much of her time would be spent on qualifying tasks versus the non-qualifying ones. For instance, the description of duties indicates that 25% of the beneficiary's time would be spent directing and coordinating functions and responsibilities and another 15% of her time would be spent directing the financial management. However, the petitioner did not identify any functions or responsibilities, nor did the petitioner provide any specific information to establish the means by which the beneficiary would carry out her directorial roles and which employees would perform the underlying functions and responsibilities the beneficiary would be coordinating and directing. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a

detailed description of the beneficiary's daily job duties, as the actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner further stated that the beneficiary would spend 20% of her time directing and formulating financial programs and the petitioner's relations with customers, suppliers, and distributors. However, the petitioner provided no explanation as to the types of financial programs the beneficiary would formulate. Additionally, based on the minimal information provided, it is not apparent that the beneficiary's involvement with customers, suppliers, and distributors falls within the definition of managerial or executive capacity. The petitioner was equally vague in discussing the specific job duties the beneficiary would perform in developing the petitioner's business and preparing for its expansion, which would consume 15% of the beneficiary's time. It is noted that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In summarizing the job description provided by the petitioner, the AAO is unable to determine what specific job duties the beneficiary would perform on a daily basis and how much of her time would be spent on tasks of a qualifying nature. Therefore, given the deficient job description and the lack of evidence establishing that the petitioner was adequately staffed to relieve the beneficiary from having to primarily perform non-qualifying tasks, the AAO is unable to conclude that the beneficiary would be employed in a qualifying managerial or executive capacity. On the basis of this second independent ground of ineligibility, the AAO cannot approve the instant petition.

Furthermore, while not expressly addressed in the director's decision, the beneficiary's majority ownership of the foreign entity is as problematic in determining that she was an "employee" of that entity as her ownership of the petitioning entity was an obstacle in her being deemed an employee in the United States. Similar to the beneficiary's role within the petitioning entity, the beneficiary ultimately owned and controlled the foreign entity, where she purported to assume a role as the principal. There is no evidence that anyone other than the beneficiary herself was in a position to exercise any control over the work performed by the beneficiary. As such, it appears the beneficiary was the employer for all practical purposes. She controlled the organization; set the rules governing her own work; and shared in all profits and losses. Therefore, by virtue of the beneficiary's majority ownership of the foreign entity, it appears more likely than not that the beneficiary was not an "employee" of the foreign operation.

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.