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U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED]  
LIN 06 244 52835

OFFICE: NEBRASKA SERVICE CENTER

Date: FEB 25 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 Massachusetts corporation claiming to be in the business of operating a retail food market specializing in meats, produce, and Middle East specialties. The petitioner 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 based on three independent grounds of ineligibility: 1) the beneficiary would not be an "employee" of the petitioning entity; 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 findings and submits a brief in support of his arguments. A full discussion of the petitioner's submissions and the director's analysis will be 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 first issue in this proceeding is whether the beneficiary will be an employee of the petitioning entity given his ownership interest in the petitioning entity at the time of filing.<sup>1</sup> The petitioner indicated, and the evidence clearly established, that the beneficiary was the sole owner of the petitioning corporation, leading the director to question whether there was an actual employer-employee relationship between the petitioner and the beneficiary. If there is no employer-employee relationship, then the beneficiary's services will not satisfy the statutory definition of managerial or executive capacity.

The director concluded that the petitioner and beneficiary did not have an employer-employee relationship as required by the relevant statutory provisions. See sections 101(a)(44)(A) and (B) of the Act (referring to the beneficiary as an employee). In support of the decision, the director cited to a United States Supreme Court decision, *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992) (hereinafter "Darden"), that defined "employee" in terms of the common-law master-servant relationship.

On appeal, counsel argues that the director's reasoning is contrary to existing case law precedent, citing *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980) (hereinafter *Aphrodite*) and *Matter of M--*, 8 I&N Dec. 24 (BIA 1958) in support of his reasoning.

In *Matter of Aphrodite*, the Immigration and Naturalization Service (INS) Commissioner addressed whether a petitioner may seek to classify a beneficiary as an intracompany transferee even though the beneficiary was a part owner of the foreign entity and, apparently, not an "employee" of either the foreign entity or the petitioner. The district director and regional commissioner had determined that the beneficiary could not be classified as an intracompany transferee because "he is 'an entrepreneur, a speculative investor, and not an employee of an international company.'" 17 I&N Dec. at 530. Relying on *Matter of M--*, the Commissioner disagreed, declined to require that intracompany transferees be "employees," and specifically noted that the word "employee" is not used in section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). 17 I&N Dec. at 531. The Commissioner further reasoned that adopting the word "employee" would exclude "some of the very people that the statute intends to benefit: executives" and noted that the *Webster's New Collegiate Dictionary* did not define "employee" to include "executives." *Id.*

Upon review, counsel's reliance on *Aphrodite* and *Matter of M--* is insufficient to overcome the director's basis for denying the petition on this ground. The 1980 *Aphrodite* and the 1958 *Matter of M--* decisions, while otherwise sound, predate the 1990 codification of the definitions of "managerial capacity" and "executive capacity" in 8 U.S.C. § 1101(a)(44), Pub. L. No. 101-649, § 123, 104 Stat. 4978, § 123 (1990), and the Supreme Court's decision in *Darden*. As the definitions of both "managerial capacity" and "executive capacity" now clearly use the word "employee" in describing intracompany transferee managers and executives, the Commissioner's decision in *Aphrodite*

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<sup>1</sup> The record contains documentation indicating that the beneficiary transferred his ownership interest to his brother on October 11, 2007. However, a petitioner must establish eligibility 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). Therefore, the AAO will not take into account the petitioner's new ownership scheme, which was only implemented after the Form I-140 was filed.

declining to impose an employment requirement upon intracompany transferees, while correct at the time, ceased being a valid approach to determining an alien's eligibility for L-1 classification in 1990.<sup>2</sup> Furthermore, as discussed in the director's decision, given that Congress did not define the term "employee" in codifying the definitions of "managerial capacity" and "executive capacity," the Supreme Court instructs that one should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Darden*, 503 U.S. at 322-323.

Therefore, while the *Aphrodite* decision remains instructive as to whether a petitioner may seek L-1 classification for a beneficiary who has a substantial ownership interest in the organization, the determination that an intracompany transferee employed in an executive capacity need not be an "employee" has been superseded by statute. Intracompany transferees, by definition, must now be "employees" in order to be eligible for classification as a managerial or executive employee pursuant to section 101(a)(15)(L) of the Act. As the preference immigrant classification sought in the present matter relies on the same statutory definitions of "managerial capacity" and "executive capacity," the same reasoning would apply to the petitioner under section 203(b)(1)(C) of the Act.

On appeal, neither the petitioner nor counsel attempted to articulate how the beneficiary would be considered an employee under terms of the common-law master-servant relationship in light of the *Darden* decision. Accordingly, the petitioner has conceded the issue and the AAO will uphold the decision of the director.

The two remaining 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;

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<sup>2</sup> The INS adopted regulations substantially similar to the definitions of "managerial capacity" and "executive capacity" ultimately codified in 1990 at 8 U.S.C. § 1101(a)(44). See 8 C.F.R. §§ 214.2(l)(1)(ii)(B)-(C); 52 F.R. 5738-01 (Feb. 26, 1987). These regulations, which also require that L-1 managers and executives be employees, were generally upheld as consistent with the Act even prior to the 1990 codification of these definitions. See *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472 (5<sup>th</sup> Cir. 1989). Therefore, an employment requirement was arguably imposed upon managers and executives seeking L-1 classification as early as 1987.

- (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 August 3, 2006, which provided the beneficiary's position titles in his foreign and proposed positions, respectively, and discussed the beneficiary's ownership interests in each of the respective entities. However, the petitioner did not provide a description of the job duties for either of the beneficiary's positions.

Accordingly, the director issued a request for additional evidence (RFE) dated October 24, 2007, addressing the deficiency noted above. Specifically, the director instructed the petitioner to provide U.S. Citizenship and Immigration Services (USCIS) with detailed job descriptions for the beneficiary's foreign and proposed positions, listing the beneficiary's specific daily job duties with each entity and assigning an estimate of time to each of the listed tasks. The director also asked that the petitioner provide organizational charts for each entity illustrating the beneficiary's position with respect to other employees within each organization.

In response, the petitioner provided a letter from counsel dated November 29, 2007 in which counsel provided two separate hourly breakdowns representing the beneficiary's responsibilities abroad in his prior position as chief managing officer as well as his current position with the foreign entity as the

assistant manager in support of the chief managing officers. The following is the hourly breakdown of the former position:

- Executive duties (meetings with accountants, bankers, lawyers, actual and potential business associates; general communications with managers) 8 hrs/wk
- Staff management duties—with managers (recruiting/coaching/disciplining staff, controlling payroll and baking operations, property management and licensing) 10 hrs/wk
- Line management duties—with managers (Directing purchase and inventory operations, establishing quality control in the meat & deli and the fresh produce departments, customer service) 14 hrs/wk
- General supervisory duties (trouble shooting, staff complaints, customer relations, cleanliness), travel and varia [sic]. 4 hrs/wk

The following hourly breakdown addresses the beneficiary's current position with the foreign entity:

- Executive support duties: (meetings with accountants, bankers, lawyers, actual and potential business associates; general communications with managers) 8 hrs/wk
- Staff management support duties—replace the [c]hief [m]anaging [o]fficers when they is away from the store (vacation, sick leave, inventory, . . .) 6 hrs/wk

Line management support duties—replace the [c]hief [m]anaging [o]fficers when they is away from the store (vacation, sick leave, inventory, . . .) 4 hrs/wk . . .

With respect to the beneficiary's proposed position with the petitioning entity, counsel stated that the beneficiary would assume the position of chief managing officer for 28 hours per week and he would assume the position of vice president for eight hours per week. Counsel explained that these duties would be identical to those the beneficiary performed in his former position with the foreign entity as described above.

The petitioner provided the organizational charts that were requested in the RFE. The foreign entity's organizational chart illustrates the staffing levels that were in place from October 2001 through June 2005. The petitioner did not explain what changes took place after 2005 or what affect the changes may have had on the entity's organizational hierarchy. As such, the AAO is unclear as to the foreign entity's staffing as of the date the Form I-140 was filed. The chart shows the beneficiary as the president, owner, and chief managing officer, all positions at the highest level of the organizational hierarchy. The chart indicates that the beneficiary's subordinates included an assistant manager, supervisor of the meat and deli department, supervisor of the fresh produce department, and supervisory of the cashiers and store clerks. The chart shows that each of the first two departments had five customer service subordinates and that the third department had six cashiers subordinate to the supervising cashier/clerk. It is noted that the subordinates at the bottom tier of the chart are not identified by name.

The petitioning entity's organizational chart depicts the beneficiary in two different positions that are second and third from the top-most position in the hierarchy. Specifically, the beneficiary is identified as both the vice president and the chief managing officer with the exact same set of subordinate positions as those listed in the foreign entity's organizational chart. The petitioner's chart shows that the meat and deli and fresh produce departments would each have four customer service subordinates and that the supervising cashier/clerk would have five subordinate cashiers. As with the foreign entity's organizational chart, the petitioner's chart also fails to identify by name the subordinates at the bottom tier of the chart.

In a decision dated April 3, 2008, the director found that the job descriptions offered by counsel in response to the RFE are overly vague and fail to specify actual job duties performed abroad and those that would be performed in the prospective position with the U.S. entity.

On appeal, counsel asserts that given the nature of the petitioner's business and the beneficiary's position therein, a detailed job description is not necessary. Counsel's argument, however, is inherently flawed, as it is inconsistent with relevant regulatory requirements. Namely, 8 C.F.R. § 204.5(j)(5) requires the petitioner to furnish a job offer clearly describing the job duties the beneficiary would perform in his proposed position. In fact, this information is generally the first element to be examined by the AAO when determining the beneficiary's prospective employment capacity.

Thus, regardless of whether counsel thinks that the beneficiary's job duties are obvious, the regulations clearly require that this information be expressly provided. The general description from the Department of Labor's occupational titles is insufficient and does not comply with the requirements of 8 C.F.R. § 204.5(j)(5), which require that the petitioner specifically state what duties the beneficiary would perform under an approved petition. The AAO is unable to determine what specific tasks are involved in controlling payroll and banking operations, property management, directing purchases and inventory operations, establishing quality control, and customer service. For instance, because the petitioner broadly states that the beneficiary controls payroll, the AAO is left to question whether the beneficiary does the underlying bookkeeping. Similarly, it is unclear whether directing purchases means that the beneficiary would find and negotiate with suppliers of the store's inventory. Any or all of these responsibilities may mean the performance of the underlying non-qualifying tasks. However, based on the vague information provided by the petitioner, the AAO cannot conclude with any degree of certainty what job duties the beneficiary performs and how much of his time has been and would spent performing them.

Additionally, counsel makes numerous references to the organizational structures illustrated, stating that the organizations have ample support staff to carry out the daily operational tasks. However, the record lacks evidence to establish whom the petitioner actually employed at the time the Form I-140 was filed. It is noted that the unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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).

Furthermore, the daily operational tasks are not limited to only the tasks performed by the in-store personnel. Rather, there are numerous administrative tasks that are also performed to ensure a retail

business's continued operation. Although the beneficiary may be indispensable for the crucial administrative tasks he performs, the petitioner has not established that these tasks fall within the definitions of managerial or executive capacity. It is the petitioner's burden to establish that the primary portion of the beneficiary's time is attributed to job duties that are within a qualifying managerial or executive capacity, as 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). As indicated above, the petitioner has not complied with the director's request for a detailed description of job duties, thereby precluding the AAO from gauging how much of the beneficiary's time was spent in the position abroad and how much of his time in the proposed position would be spent performing duties within a qualifying capacity.

Lastly, counsel asserts that the Adjudicator's Field Manual states that courts view prior approvals of L-1A nonimmigrant petitions as a presumption that the petitioner has already met analogous requirements. However, the Adjudicator's Field Manual is an internal instructional aid for USCIS officers and in no way binds the AAO as would a statute, regulation, or published case law precedent. Moreover, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The approval of a nonimmigrant petition in no way guarantees that USCIS will approve an immigrant petition filed on behalf of the same beneficiary. USCIS denies many I-140 immigrant petitions after approving prior nonimmigrant I-129 L-1 petitions. See, e.g., *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). In fact, because USCIS generally spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1 petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29-30 (D.D.C. 2003) (recognizing that USCIS approves some petitions in error). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. Upon review, the AAO notes that if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. at 597.

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

In summary, the petitioner has failed to overcome the director's adverse findings regarding the (1) lack of an employer/employee relationship between the U.S. employer and the beneficiary, (2) the failure to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity, and (3) the failure to establish that the beneficiary will be employed in a qualifying managerial or executive capacity in the United States. Therefore, based on these three independent grounds of ineligibility, this petition cannot be approved.

Finally, the record precludes the AAO from finding in favor of the petitioner based on at least one additional ground of ineligibility that was not previously addressed in the director's denial. Namely, 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." In the present matter, the petitioner claims to operate a retail business. Although the petitioner has provided a 2005 tax return, such a document cannot be relied upon to determine whether an entity is conducting business on a "regular, systematic, and continuous" basis. *See id.* Therefore, the AAO cannot conclude that the petitioner has met the requirements specified in 8 C.F.R. § 204.5(j)(3)(i)(D).

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.

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.