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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER
LIN 08 055 50402

Date: **JUL 08 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 Missouri corporation that 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 two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel disputes the director's conclusions and submits a brief asserting that the beneficiary has been and would continue to be employed in an executive capacity by the U.S. entity.

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.

As a supplement to Part 6, Item 3 of the Form I-140, the petitioner submitted the following description of the beneficiary's proposed employment:

- a. Reports to the president of Dornyn Gobi Co., Ltd. (2 hrs./wk.);
- b. Manages the expansion of the business in the U.S. and the local markets in the St. Louis metropolitan area (8 hr./wk.);
- c. Oversees and guides Vice-President in resolving difficult decision making problems (4 hrs./wk.);
- d. Assists Vice-President in negotiating, buying, and dealing with vendors (2 hr./wk.);
- e. Represents the company and completes business transactions such as acquisitions and dispositions of corporate assets, and ensures that [the] company is complying with all city, state, and federal rules and regulations (4 hrs./wk.);
- f. Reviews accounting to ensure all financial matters are meeting with company standards, including payroll, inventory, accounts receivables, and payables (1 hr./wk.);
- g. Travels to learn about new product lines and has final decision making authority over which products will be purchased for resale (8 hrs./wk.);
- h. Enhances opportunities of expansion and profit margins for the company for the company (1 hr./wk.);
- i. Finalizes new goals, policies, and incentive programs for the employees and the company as a whole (4 hrs./wk.);
- j. Selects new store locations, remodeling projects, and expansion ideas for the business (4 hrs./wk.); and
- k. Supervises other management personnel (2 hrs./wk.).

The petitioner also provided a supplement to Form ETA-750, Part B, Question 15, which included the following description of the beneficiary's employment as executive director of the foreign entity:

- a. Reports to the General Director of Dornyn;
- b. Participates in the expansion of the company's business[;]
- c. Oversees all subsidiaries and their directors;
- d. Guides directors in resolving difficult decision making problems;

- e. Assist[s] directors in negotiating large contracts with other businesses;
- f. Ensure[s] directors are complying with all company inventory and purchasing standards;
- g. Oversees accounting to ensure conformation with company standards;
- h. Travels to learn about new products, and has final decision making authority over which new product line[s] will be sold;
- i. Ensure[s] that all company policies and standards are implemented and taught to all employees;
- j. Selects new store locations to expand the business; and
- k. Hires other managerial personnel.

On March 20, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide detailed descriptions of the beneficiary's day-to-day job duties for his position abroad and for his proposed position with the U.S. entity. The petitioner was asked to assign a percentage of time to each job duty. The petitioner was also asked to provide organizational charts for the U.S. and foreign entities, depicting the beneficiary's position in relation to others in each entity. Additionally, the petitioner was instructed to provide its complete U.S. tax returns or audited financial statements for 2006 and 2007.

In response, the petitioner provided the following position breakdown accompanied with the amount of time attributed to various activities on a weekly basis:

- a. Reports to the General Director of Dornyn Gobi Co., Ltd. (8 hrs./wk.);
- b. Manages the expansion of the business in the U.S. and European markets overseas (12 hr./wk.);
- c. Represents the company and completes business transactions such as acquisitions and dispositions of corporate assets, and ensures that the company is complying with all city, state, and federal rules and regulations (4 hrs./wk.);
- d. Travels overseas to learn about new product lines and has final decision making authority over which products will be purchased or reproduced for sale (8 hrs./wk.);
- e. Oversees and guides [the] Manager in resolving difficult decision making problems (10 hrs./wk.); and

- f. Assists [the] Manager in negotiating, buying, and dealing with vendors (2 hr./wk.).

It is noted that the above description is virtually identical to six of the eleven items that were previously attributed to the beneficiary's proposed position. The only obvious difference is the time assigned to the activities described in items a, b, and e above.

With regard to the beneficiary's proposed employment, the petitioner provided the following position description in response to the RFE:

- a. Reports directly to the General Director of Dornyn Gobi Co., Ltd. (6 hrs./wk.);
- b. Manages the expansion of the business in the greater St. Louis metropolitan area and other U.S. markets (10 hr./wk.);
- c. Represents the company and completes business transactions such as acquisitions and dispositions of corporate assets, and ensures that the company is complying with all government rules and regulations (4 hrs./wk.);
- d. Travels around the U.S. to learn about new product lines and has final decision making authority over which products will be purchased for resale (8 hrs./wk.);
- e. Oversees and guides the Vice President, Controller, and Manager in resolving difficult decision making problems (10 hrs./wk.);
- f. Assists [the] Manager in negotiating, buying, and dealing with vendors (2 hr./wk.).

Similar to the foreign position description offered in response to the RFE, the above description of the beneficiary's proposed U.S. employment is very similar to the position description initially provided, the key difference being the times allotted to certain activities that were included in the initial description were omitted entirely from the more recent position description.

With regard to the organizational charts, the foreign entity's chart shows the beneficiary as second in command with a general director as his direct superior and a manager as his direct subordinate. The remainder of the subordinate positions are identified as companies that are under the supervision of the manager. With the hierarchy of the U.S. entity, the beneficiary's position is at the top of the organizational structure with a vice president identified as his direct subordinate. It is noted, however, that the individual named as the company's vice president is the same individual who was shown in the foreign entity's chart as the general director. Thus, according to the above job descriptions, the beneficiary answers directly to the foreign entity's general director in both his foreign and U.S. positions, thereby creating a confusing hierarchy where his U.S. subordinate is actually his superior based on that individual's continuing responsibility as the foreign entity's general director.

The petitioner also provided an employee list and daily schedule for 2007 and 2008 identifying each employee by name and providing each employee's hourly or yearly rate of pay; a copy of its 2007 Form W-3; the ten Forms W-2 issued in 2007; and the petitioner's 2006 Form 1120 for the tax year ending on June 30, 2007. It is noted that, according to the daily schedule for 2007, the petitioner is shown as having only four full-time employees with the remainder of the employees working limited part-time schedules as confirmed by their respective Forms W-2.

On June 13, 2008, the director denied the petition, concluding that the petitioner failed to provide adequate detail in its description of the beneficiary's foreign employment. The director determined that the petitioner did not cite specific tasks that can be deemed as managerial or executive. With regard to the beneficiary's proposed employment, the director observed that similar information was provided with altered time allotments, which the petitioner did not explain. The director also observed the confusion surrounding the beneficiary's subordinate/superior whom the beneficiary is purportedly overseeing in his capacity as president of the U.S. entity and who simultaneously continues to oversee the beneficiary. The director ultimately found that the proposed position description was similarly devoid of sufficient detail as was the description of the beneficiary's foreign employment.

On appeal, counsel focuses on the beneficiary's proposed position with the U.S. entity, arguing that the beneficiary indirectly owns a majority of the petitioning entity and has de facto control over that entity. Counsel offers this argument for the purpose of establishing that the beneficiary has a long-term interest in the petitioning entity and that the salary amount is not probative in determining whether the beneficiary would be employed in an executive capacity. In reviewing the statute and regulations, the AAO agrees with counsel's argument, as there is no salary requirement that a petitioner must meet in order to establish a beneficiary's managerial or executive capacity. The director's comment regarding the beneficiary's salary not being commensurate with an executive position is not based firmly in any statute, regulation, or case law and is hereby withdrawn.

Notwithstanding the director's erroneous statement, counsel's arguments on appeal are not persuasive and do not overcome either of the two grounds for denial. With regard to the adverse finding concerning the beneficiary's foreign employment, counsel failed to state any argument showing why the director's decision was erroneous. Therefore, on the basis of this first ground, this petition cannot be approved.

Next, while counsel attempts to address the second ground concerning the beneficiary's proposed U.S. employment, counsel's statements are primarily focused on the director's erroneous comment rather than on providing clarity to the beneficiary's proposed job duties and the means by which the petitioner would relieve the beneficiary from having to primarily perform non-qualifying tasks.

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). Therefore, when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The AAO will then consider this information in light of the petitioner's

organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks. In the present matter, the petitioner was duly informed, via an RFE, that the job descriptions the petitioner initially submitted were insufficient due to their overall lack of detail regarding specific job duties. It is therefore unacceptable that the petitioner resubmitted portions of the same job description, altering the original time allotments, without specifically explaining what tasks the beneficiary would perform on a daily basis and why the original time allotments were altered. The AAO considers this an inconsistency, of which the petitioner was later notified in the notice of denial, but which counsel failed to either acknowledge or resolve on appeal. 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).

The director also discussed, in sufficient detail, his utter confusion regarding the fact that the same individual who was identified in the U.S. entity's organizational chart as the beneficiary's subordinate is also apparently the beneficiary's direct supervisor in some respects. However, counsel on appeal left this anomaly unexplained and unaddressed as well.

Lastly, the petitioner's 2007 daily work schedule and W-2s for 2007 both identify ten employees. However, precedent case law has established that 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). In the present matter, while the petitioner may have had ten employees at some point during 2007, the Form I-140 clearly shows that the petitioner had a total of five employees at the time of filing. The petitioner has provided no evidence or information as to which employees were part of its organizational hierarchy at the time of filing. The AAO therefore is unable to determine which positions within the organization were filled and which tasks were actually carried out by a subordinate staff. While the beneficiary's job description is clearly key to determining what job duties he carried out, the petitioner must provide supporting evidence to establish that it was capable of relieving the beneficiary from having to primarily carry out non-qualifying tasks on a daily basis at the time of filing. It is further noted that in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *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)). Here, due to the lack of sufficient supporting evidence establishing whom the petitioner employed at the time of filing, the AAO is unable to gauge the petitioner's level of capability in employing the beneficiary in a qualifying managerial or executive capacity.

Therefore, due to the petitioner's failure to provide an adequate description of the beneficiary's proposed job duties and due to the overall lack of evidence establishing the petitioner's ability to relieve the beneficiary from having to primarily perform non-qualifying tasks, this petition must be denied on the basis of the second ground as well.

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

First, 8 C.F.R. § 204.5(j)(3)(i)(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 contends that it is a beauty supply store, thereby indicating that it is engaged in some form of retail sales. Although the petitioner provided its 2006 tax return and 2007 W-3 and W-2 documents, these documents do not show the frequency of the petitioner's sales transactions. As such, they cannot be relied upon to determine whether an entity is conducting business on a "regular, systematic, and continuous" basis. *See id.* 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)). Accordingly, without proper supporting evidence, the AAO cannot determine whether the petitioner has been doing business in the manner and during the time period prescribed by 8 C.F.R. § 204.5(j)(3)(i)(D).

Second, 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 (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 majority owned and ultimately 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.

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.