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By

FILE:

SRC 06 264 52288

Office: NEBRASKA SERVICE CENTER

Date: **MAR 31 2009**

IN RE:

Petitioner:

Beneficiary:

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:

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 Georgia corporation engaged in the business of selling saunas manufactured by the foreign entity that employed the beneficiary abroad. The petitioner seeks to employ the beneficiary as its executive director. 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 the United States in a managerial or executive capacity.

On appeal, counsel submits a brief disputing both of the director's conclusions. Additionally, the petitioner supplements the record with a one-day sample work schedule for the beneficiary's positions with the foreign and U.S. entities. A complete analysis of these submissions and the director's findings will be provided in the discussion below.

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

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

\* \* \*

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

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

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

The two primary issues in this proceeding call for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the beneficiary was employed abroad and whether he would be employed in the United States in a qualifying managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the Form I-140, the petitioner submitted a letter dated August 3, 2006, which included a variety of statements discussing the beneficiary's foreign and proposed positions. As the director has restated this information in the denial, the AAO need not repeat it at this time. The petitioner also provided organizational charts illustrating the staffing and organizational hierarchies of the foreign and U.S. entities. The foreign entity's organizational chart depicts the beneficiary at the top of the hierarchy with the position title of president. The beneficiary's immediate subordinate was a manager whose two subordinates included a section chief and a director. The U.S. entity's organizational chart depicted a similar structure with the beneficiary's position as the head of the organization, again in the position of president, and a manager as his immediate subordinate. The chart shows that the manager's three subordinates include a section chief, a director, and a secretary. Both organizational charts identified the employees who filled each of the listed positions and provided a brief list of the job responsibilities associated with each of the positions.

After reviewing the petitioner's submissions, the director determined that the petition could not be approved without further evidence. Accordingly, the director issued the first of two requests for additional evidence (RFE) dated October 23, 2006. This RFE instructed the petitioner to provide further documentation establishing its own on-going business activity during a specific one-year period as well as the current on-going business activity of the petitioner's claimed foreign affiliate. Although it appears that the petitioner responded to the first RFE, the response is not in the record of proceedings. Upon initial review of the record, the AAO learned of the missing RFE response and issued its own notice dated November 28, 2008, instructing the petitioner to provide either the actual response that had been previously submitted or to provide a new response to the director's previously issued RFE. The AAO sent copies of its own RFE as well as the RFE issued by the director to both the petitioner and its counsel and allowed the parties 45 days in which to respond with the requested documentation. However, the 45-day period has since lapsed and no response has been received from either party.<sup>1</sup>

On July 19, 2007, the director issued a second RFE, instructing the petitioner to address various issues regarding its eligibility. The director incorporated the issues discussed in the initial RFE and further instructed the petitioner to provide evidence establishing that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity. More specifically, the petitioner was instructed to provide detailed descriptions of the beneficiary's job duties during his employment abroad and during his proposed employment with the U.S. entity. The petitioner was expressly asked to list specific job duties and to assign the proportion of time that was devoted and would be devoted to each of the listed duties. The petitioner was also asked to discuss the job duties of the beneficiary's subordinates and to provide evidence, such as Form 1099s or work contracts, as evidence of the contract employees the petitioner previously referenced.

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<sup>1</sup> It is noted that the copy of the AAO's notice that was sent directly to the petitioner has been returned to the AAO with a post office notice indicating that the addressee, i.e., the petitioner, is not at the address indicated and that a forwarding address has not been provided. It is noted that the AAO has not received any information from the petitioner regarding an updated mailing address. This being said, a copy of the AAO's notice, which contained a copy of the previously issued RFE from the director, was also sent to the petitioner's counsel. Therefore, the petitioner is deemed to have been properly served with the AAO's and the director's RFEs.

In response, the petitioner provided sufficient documentation of the foreign entity's continued business activity as well the U.S. entity's business activity during the relevant one-year time period. *See* 8 C.F.R. § 204.5(j)(3)(i)(D). The petitioner also provided documentation to address the deficiencies regarding the beneficiary's employment capacity. Specifically, the petitioner provided a job description for each of the beneficiary's positions, the foreign and U.S. entities' organizational charts, and a weekly work schedule for each of the U.S. entity's employees. It is noted that the beneficiary's job descriptions as well as the weekly schedules of the petitioner's employees have been incorporated into the director's decision. As such, the AAO need not restate this information in the current decision.

On December 27, 2007, the director issued a decision denying the petitioner's Form I-140. The director included a comprehensive analysis of the beneficiary's foreign and proposed positions, concluding that the information and documentation submitted was insufficient to establish eligibility. The director found that the job descriptions for the beneficiary's foreign and proposed employment lacked sufficient detail such that the director was unable to determine how the beneficiary had been and would be relieved from performing the duties underlying the various functions with which the beneficiary had been and would be in charge of managing. In general, the director noted that the petitioner discussed the beneficiary's broad job responsibilities without specifying any underlying job duties as they relate to those responsibilities.

On appeal, counsel asserts that the beneficiary was employed abroad and would be employed in the United States in an executive capacity. With regard to both positions, counsel focuses on the beneficiary's discretionary authority in implementing certain policies and goals to ensure maximization of each company's profits with relatively low overhead costs. However, the level of discretionary authority is only one factor in determining whether the beneficiary's employment fits the definition of executive (or managerial) capacity. It is possible for a beneficiary to work for a small company where he or she is at the highest level within that company's hierarchy, but is nevertheless performing that company's daily operational tasks during the primary portion of his or her time at work. As such, U.S. Citizenship and Immigration Services (USCIS) places great weight on the description of the beneficiary's job duties. In fact, 8 C.F.R. § 204.5(j)(5) expressly requires that the beneficiary's prospective employment be described in detail the time the petition is filed. Published case law supports the significance of a detailed statement of the beneficiary's job duties by establishing that the actual duties themselves 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).

Therefore, only by submitting sufficient information about the beneficiary's daily job duties can the petitioner establish how the beneficiary has spent or would spend the primary portion of his time. 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). That being said, the petitioner attempts to provide further insight into the beneficiary's past and proposed job duties by providing sample schedules of a single day during the beneficiary's foreign and U.S. employment. The following is a sample one-day schedule of the beneficiary's employment abroad:

- 9:00-10:30 Conference meeting with staff. Discuss whether any new opportunities in the market that [sic] have arisen.
- 10:00-11:30 Conference with sub-contractor to go over the progress of the project that they are involved with. Ensure that the work is on schedule and to resolve any conflicts the sub-contractor may have with project designs. Approve or disapprove any variances that may come up.
- 11:00-11:30 Review voice mail and emails and respond accordingly.
- 1:00-2:00 Meet with [REDACTED] to review and approve architectural diagrams and drafts.
- 2:00-2:30 Contact vendor[s] in China to determine the progress of the materials ordered.
- 2:30-4:00 Meet with [a] representative director to negotiate prices and timeline in order to enter into a contract for the construction and installation of a sauna room.
- 4:00-5:00 Contact representative directors of ongoing projects to ensure that construction is going smoothly.
- 5:00-5:30 Meet with [REDACTED] to discuss what issues arose at the construction site.
- 5:30-6:00 Review monthly financial reports to determine what costs need to be trimmed and projects are needed to be promoted for the upcoming quarter to maximize profitability.

The petitioner provided the following itinerary of one day in the beneficiary's employment with the U.S. entity:

- 8:30-9:00 Conference call with [the] head officer in Korea.
- 9:00-10:00 Conference with employees regarding the week ahead and upcoming deadlines.
- 10:00-10:30 Respond to e-mails and return voicemails.
- 1:00-2:00 Meet with contractor to negotiate the quantity of saunas to be installed and the materials to be used prior to signing of the contract.
- 2:15-3:00 Prepare for [a] speech to be given on the advantages of Asian style versus Western style saunas.

- 3:00-4:00 Meet with potential new customer interested in the construction of a new sauna near [REDACTED]
- 4:00-4:30 Meet with architect [REDACTED] to discuss changes to the design.
- 4:30-6:00 Meet with [REDACTED] to review the progress of the ongoing projects.

While the information provided in the above itineraries has been considered, it is not sufficient to overcome the director's findings. First, the AAO notes that even if the itineraries consisted exclusively of qualifying tasks, each itinerary represents only a single day, or 20%, of a five-day work week. The AAO cannot make assumptions as to the nature of the job duties the beneficiary performed and would perform based on its knowledge of how the beneficiary spent and would spend 20% of his time. That being said, the beneficiary's itineraries do not cite only qualifying job duties. Rather, significant portions of the beneficiary's time have been and would be devoted to operational tasks. For instance, the sample one-day itinerary of the beneficiary's former employment showed that one hour was devoted to a staff conference and another hour was devoted to meeting with the company's section chief. It is noted, however, that, with the exception of the beneficiary's immediate subordinate, the petitioner has not established that the foreign entity's staff was comprised of managerial, professional, or supervisory employees. Therefore, the two hours spent overseeing the foreign entity's staff cannot be deemed as qualifying tasks. The petitioner also stated that one half hour was devoted to checking voicemails and emails, another half hour was devoted to contacting a vendor in China, and one and a half hours were spent negotiating prices and timelines with a representative director, for a total of two and a half hours. However, the petitioner has not established that these job duties can be deemed qualifying. Therefore, keeping in mind that the beneficiary's day included a one and a half hour lunch break, more than 50% of his eight-hour work day was spent on duties that cannot be deemed as qualifying.

While the AAO acknowledges that a beneficiary is likely to devote at least a portion of his time to some operational tasks, it is the petitioner's burden to establish that the primary portion of the beneficiary's time at work had been spent on tasks within a qualifying capacity. The above sample of a single day during the beneficiary's former employment does not meet this burden.

With regard to the beneficiary's proposed employment, the AAO similarly finds that a single day's tasks are not indicative of the tasks that would be performed during the four remaining days of the beneficiary's work week, particularly when a number of the tasks that are listed are not tasks that the beneficiary is likely to perform on a regular daily basis. For instance, the petitioner allots one hour to meeting with an attorney to ensure compliance with federal and state laws and three quarters of an hour to preparing a speech on the benefits of the petitioner's products. Not only has the petitioner failed to establish that either of these tasks is of a qualifying nature, neither is likely to be a recurring task such that it can be deemed as part of the beneficiary's daily routine. Additionally, the beneficiary's time spent checking voicemails and emails, meeting in a conference with employees, meeting with a subcontractor for contract negotiations, and the meeting with a potential customer, all of which cumulatively consume three and one half hours of the beneficiary's time, cannot be deemed as qualifying tasks. Thus, if each day of the beneficiary's proposed employment would be spent

performing tasks similar to those identified in the sample itinerary, then the AAO could only conclude that the primary portion of the beneficiary's time would be spent performing non-qualifying tasks. That being said, the AAO cannot speculate or assume which tasks the beneficiary would perform during the remainder of a five-day work week. However, as previously stated, the burden of establishing that the primary portion of the beneficiary's time would be spent performing tasks of a qualifying nature remains with the petitioner. The fact that the petitioner has failed to provide a specific list of job duties the beneficiary would perform during the course of a forty-hour work week precludes the AAO from being able to conclude that the beneficiary would be employed in a primarily managerial or executive capacity.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were previously addressed in the AAO's earlier RFE, which was issued on November 28, 2008.

First, the AAO reviewed the director's initial RFE, which was issued on October 23, 2006, and incorporated the director's request for all Form 1099s issued to the petitioner's claimed subcontractors in 2006 and 2007. Such documentation is necessary as evidence to support the petitioner's claims regarding its hiring of subcontractors to perform certain work. 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)). As a response to the AAO's notice has not been received, the petitioner has failed to support its claimed use of subcontractors.

Second, the AAO discussed a discrepancy with regard to the ownership of the petitioner's stock. Specifically, the AAO noted that the petitioner's unaudited 2006 balance sheet, which shows that the petitioner issued \$1,000 in common stock, is inconsistent with the petitioner's claim and other documentation on record, which indicate that the foreign entity purchased 100,000 shares of the petitioner's stock for \$10,000. The AAO explained that this inconsistency must be reconciled using independent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). However, due to the petitioner's failure to respond, this inconsistency remains unresolved. 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).

Lastly, due to the petitioner's failure to resolve questions regarding its ownership, the beneficiary, by virtue of his claimed ownership of the foreign entity, may indirectly be the owner of the U.S. petitioner. Thus, in light of the beneficiary's proposed relationship to this business, 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 CIS has defined the terms "employee," "employer," or "employed" by regulation for purposes of the multinational executive and managerial immigrant 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 petitioner has not provided any evidence to address and overcome the AAO's adverse findings described above.

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.