

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

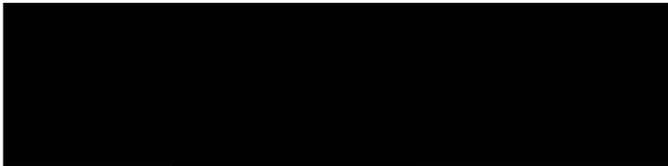
U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

B4



FILE: [REDACTED]  
SRC 08 133 54148

OFFICE: TEXAS SERVICE CENTER

Date: OCT 02 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, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Texas corporation that seeks to employ the beneficiary as its president/general manager. 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 found that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity and denied the Form I-140 on that basis. On appeal, counsel disputes the director's finding and submits a brief addressing the director's concerns.

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 primary issue in this proceeding is whether the petitioner established that the beneficiary 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 beneficiary, on behalf of the petitioner, submitted a letter dated March 14, 2008, which offers the following information regarding the proposed U.S. employment:

As necessary I am responsible for hiring the appropriate employees to provide administrative, [sic] and technical support to our company. At this stage of the company['s] growth I primarily have outsourced most of the functions required to operate the business.

Currently I am supervising only one (1) employee, adding more personnel and outsourced services as needed. I exercise authority in regard to hiring, firing, training, delegation of assignments according to capabilities, preferences and technical goals, disciplines, promotions, and remuneration of employees. I will conduct performance reviews and will ensure that the staff follows corporate procedures and goals.

\* \* \*

I locate, negotiate, and contract third parties to carry on the business of real estate construction. I work through the [g]eneral [c]ontractor and sometimes directly with suppliers and subcontractors to carry on the work of [the petitioner]'s business. I work with professionals such as attorneys, accountants, and engineers and have to deal with government officials as well.

\* \* \*

In the area of sales and marketing, I develop marketing plans and goals and have contracted with Exit Realty Laredo . . . to sell individual condos being constructed.

I am responsible for setting goals and planning, designing and implementing adequate marketing procedures to ensure that those goals are met. I exercise autonomous control, exercise a wide latitude and discretionary decision making in establishing the most advantageous courses of action for the successful management and direction of our development activities.

I am responsible for creating and maintaining the company's budget. This includes reviewing accounts receivable, expense accounts, billing systems and the use of cash flow. I am establishing any and all necessary activities, processes and/or programs to safeguard the reduction of costs while increasing earnings and productivity. I am responsible for preparing production reports and financial statements for presentation to other shareholders of the company.

On May 13, 2008, the director issued a notice instructing the petitioner to provide an additional statement describing the beneficiary's proposed employment in much greater detail, specifying the actual job duties associated with goal-setting, policy-making, and making discretionary decisions. The petitioner was also asked to illustrate the beneficiary's position within the company's organizational hierarchy by providing an organizational chart of the current staffing.

In response, the beneficiary provided a letter dated June 9, 2008 in which he repeated the information he initially provided in the support letter. The beneficiary reiterated the responsibilities that place him at the top of the hierarchy as the key decision-making authority and discussed the numerous contractors he currently works with on the petitioner's various building projects.

Additionally, the petitioner's counsel provided a letter dated June 11, 2008 in which he explained that due to the nature of the petitioner's business, i.e., construction, most of the work is carried out through third parties, thereby eliminating the need for issuing Form W-2s. Counsel further stated

that while the beneficiary deals with service providers, such as engineers, attorneys, and real estate brokers, and negotiates with the contractors and inspects the job sites, the construction aspect of the business, including supervision of the building projects, is carried out by contractors and subcontractors. Counsel claimed that the beneficiary is employed in an executive and managerial capacity, identifying the beneficiary's direction over the petitioner's administrative manager as an element of directing the management of the company. *See* section 101(a)(44)(B)(i) of the Act.

On June 28, 2008, the director issued a decision denying the petitioner's Form I-140. The director discussed the fact that the petitioner's organizational hierarchy includes only one employee aside from the beneficiary, and further noted that the petitioner did not provide evidence establishing that a Form W-2 was issued to that employee. The director explained that while the definitions for executive and managerial capacity require certain levels of authority, the petitioner must establish that the primary portion of the job duties the beneficiary would perform under an approved petition would be within a qualifying managerial or executive capacity.

Therefore, merely making decisions about the petitioner's general operation is insufficient; the petitioner must also establish that such decision-making occupies the primary portion of the beneficiary's time. Here, while the director did not dispute that the beneficiary is a key decision-making authority within the petitioner's organization, he found that the beneficiary primarily performs operational tasks that are outside the scope of what is deemed to be within a managerial or executive capacity.

On appeal, counsel argues that the director failed to consider the nature of the business in which the petitioner operates, where third party contractors are hired to do a majority of the work, thereby eliminating the need for employees. Counsel's argument, however, is premised on the notion that most of the non-qualifying tasks are associated with the construction aspect of the petitioner's business. This argument is inherently flawed, as it fails to take into account the numerous administrative tasks associated with the business. The beneficiary has expressly stated that he negotiates with the contractors and suppliers, develops and implements the marketing plans that will ultimately be used to help sell the finished construction, and handles many bookkeeping-type tasks, including reviewing accounts receivable, expense accounts, and the overall cash flow. As these various tasks are non-qualifying, the petitioner must provide evidence to establish that the beneficiary does not spend the primary portion of his time performing them. 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 the present matter, the beneficiary has clearly indicated his intention to reduce costs "while increasing earnings and productivity." While the beneficiary may reach these business goals by sparing the petitioner the added expense of a support staff, the petitioner's needs do not override the statutory provisions, which require that the beneficiary's time be primarily devoted to managerial or executive-level tasks. Here, the lack of an office staff results in the beneficiary having to perform various non-qualifying administrative and other operational tasks. Although some non-qualifying tasks are permitted, any petitioner that plans to employ a beneficiary in a managerial or executive

capacity must establish that the non-qualifying tasks are only incidental to the beneficiary's job and do not comprise the primary portion of the beneficiary's time. In the present matter, the petitioner has not provided sufficient evidence to establish that the operational tasks are merely incidental. Rather, the beneficiary appears to be devoting a majority of his time to such tasks. Moreover, it is also noted that any time spent supervising, directing, or overseeing the work of the petitioner's contractors cannot be considered as being a qualifying managerial or executive duty. Whether or not these specific tasks would normally be deemed managerial or executive if performed in relation to the internal staff of the petitioner, they would be deemed in this instance to be tasks necessary to provide a service, albeit a management service, being provided by the petitioner as a general contracting company and thus, would be non-qualifying. Again, 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 id.* As such, the AAO cannot conclude that the petitioner has established that it would employ the beneficiary in a primarily managerial or executive capacity.

Lastly, while not addressed in the director's decision, the AAO finds one additional basis for denial. Namely, 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 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 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.