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U.S. Citizenship
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FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date: OCT 22 2009
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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: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Pennsylvania corporation that seeks to employ the beneficiary as its chief executive officer (CEO). 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 it had the ability to pay the beneficiary's proffered wage commencing on and continuing beyond the date the Form I-140 was filed; and 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, the beneficiary, on behalf of the petitioner, disputes both grounds for denial and submits a statement as well as additional documentation in support of his arguments.

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

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

* * *

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

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

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

The first issue to be addressed in this decision is whether the petitioner met the requirements for the ability to pay the beneficiary's proffered wage as specified in 8 C.F.R. § 204.5(g)(2), which states the following, in pertinent part:

Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

On June 20, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide additional evidence establishing eligibility for the immigration benefit sought. The director notified the petitioner that the record lacked sufficient evidence establishing that it had the ability to pay the beneficiary's proffered wage of approximately \$120,000 annually from the date of filing the Form I-140 and continuing forward. The petitioner was also notified of the types of documentation that could be submitted in order to establish its ability to pay.

In the decision dated October 25, 2007, the director summarized the documents submitted in response to the above request. The director observed that the petitioner did not employ the beneficiary at the time the petition was filed and further noted that while the petitioner claimed in the response to the RFE that it employed the beneficiary as of June 1, 2007, no evidence was submitted to establish the beneficiary's current wages. The director then analyzed the information provided by the petitioner via its 2006 corporate tax return, which showed a negative taxable income and liabilities that outweighed the petitioner's net current assets.¹ With regard to the subcontract the petitioner submitted in response to the RFE, the director found that this document does not serve as reliable evidence of the petitioner's ability to pay.

On appeal, the beneficiary submits a letter dated November 20, 2007, referring to the petitioner's 2007 profit and loss statement, which shows current profit of \$274,483.52. This document, however, is not persuasive in establishing the petitioner's ability to pay. First, the provisions of 8 C.F.R. § 204.5(g)(2) expressly require that the petitioner's ability to pay be established as of the priority date, i.e., the date the Form I-140 is filed. In the present matter, the petition was filed on August 16, 2006, thereby imposing upon the petitioner the burden of establishing its ability to pay as of that date, which predates the submitted profit and loss statement. Thus, even if the AAO were to consider the submitted profit and loss statement, the submitted document does not establish the petitioner's ability to pay as of August 2006. Second, the petitioner has cited no authority to support its reliance on an unaudited profit and loss statement as an appropriate means for establishing the ability to pay. Therefore, the petitioner's 2007 profit and loss statement will not be accorded any probative value in the current proceeding.

Additionally, the beneficiary refers to a contract proposal, which shows the monetary amount allotted to pay for labor, including the beneficiary's salary. Again, the petitioner has cited no

¹ See page two of the denial dated October 25, 2007.

authority to support its reliance on a proposed contractual budget as a means for establishing the petitioner's ability to pay the proffered wage. Moreover, even if this document were considered, the cost breakdown of labor shows that the beneficiary would be compensated a total of \$90,000, which is approximately \$30,000 less than the proffered wage.

Accordingly, in light of the above, the AAO finds that the petitioner has failed to provide sufficient evidence to establish that it had the ability to pay the beneficiary's proffered wage commencing on and continuing beyond the date the Form I-140 was filed. Therefore, based on the above findings, this petition cannot be approved.

The other issue in this proceeding is whether 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 petitioner submitted a brief list of the beneficiary's proposed job responsibilities. As the director incorporated this information into the decision denying the petition, the AAO need not repeat this information in the current discussion.

In the RFE dated June 20, 2007, the director instructed the petitioner to provide a detailed job description listing the beneficiary's specific tasks and assigning the percentage of time that would be devoted to each task.

In response, the petitioner submitted a letter dated August 27, 2007, which indicates that the beneficiary "manages the organization, [and] supervises and controls professional employees." The petitioner also indicated that the beneficiary assumes the role of CEO and program manager with respect to the administration of government contracts. With regard to the director's request for a percentage breakdown of the beneficiary's proposed tasks, the petitioner resubmitted the description that was previously offered in support of its nonimmigrant petition in which it sought to classify the beneficiary as an L-1A intracompany transferee.

Nevertheless, the director included the percentage breakdown in his October 25, 2007 decision. As such, the AAO need not repeat this information in the current decision. In assessing the petitioner's submissions, the director found that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. The director noted that the petitioner's limited staffing does not warrant the employment of the number of executives it claims to have based on the position titles provided for the beneficiary's subordinate employees. The director also found that non-qualifying tasks would be inherent to the beneficiary's proposed position.

On appeal, the beneficiary places great emphasis (and asks the AAO to do so as well) on the petitioner's current stage of development. The beneficiary indicates that the beneficiary did not receive funds to commence research on its project until November 2006 and that as a result additional staffing was not necessary at the time of filing. This argument erroneously suggests that USCIS should waive the petitioner's statutorily imposed burdens to account for the company's early stage of development. Contrary to the beneficiary's suggestion, however, the petitioner must establish its eligibility at the time the petition is filed; 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). Thus, the AAO cannot take into account the beneficiary's assurances that additional staff would eventually be hired once the petitioning entity progresses to the next stage of development.

The beneficiary further states that he is currently "responsible for all aspects of the company's development including negotiation . . . of development funding." The beneficiary claims that he is

also responsible for purchasing equipment and supervising subcontractors and further indicates that he is the primary contact for political representatives and the U.S. Armed Forces. The beneficiary explains that he will eventually supervise the office staff, laboratory and knitting staff, and non-woven material production staff.

Based on the beneficiary's explanation the AAO cannot conclude that the petitioner had the ability to employ the beneficiary in a qualifying capacity at the time the petition was filed. 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's explanation indicates that the petitioner was in its primary stage of development at the time the petition was filed and did not have the ability to properly staff its organization such that the beneficiary could be relieved from having to primarily perform non-qualifying tasks.

Additionally, while the director expressly instructed the petitioner to provide a detailed list of the beneficiary's proposed tasks, the petitioner provided a job description that primarily consisted of general job responsibilities and broad business objectives, such as directing, coordinating and controlling the foreign and U.S. entities, managing the petitioner's current contract, expanding the U.S. entity, and pursuing a strategic partnership with another company. The AAO notes that reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. *See* 8 C.F.R. § 204.5(j)(5). The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In the present matter, the job description fails to identify the beneficiary's specific daily job duties. Therefore, in light of the various deficiencies described above, the AAO finds that the petitioner has failed to establish that the beneficiary would be employed by the U.S. entity in a qualifying managerial or executive capacity.

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

First, 8 C.F.R. § 204.5(j)(3)(i)(B) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to his entry to the United States as a nonimmigrant to work for the same employer. In the instant matter, the director specifically addressed this issue in the RFE by instructing the petitioner to provide a detailed list of the beneficiary's daily tasks accompanied by an estimate of time that was devoted to each individual task. The petitioner's response included copies of documents submitted earlier with regard to the petitioner's filing of an I-129 nonimmigrant petition on behalf of the same beneficiary. Specifically, the petitioner stated that the beneficiary's job duties abroad were primarily the same as the job duties he would perform in his proposed position with the U.S. entity. As such, the AAO would apply similar reasoning in concluding that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

Second, 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 has indicated that it is a research and development enterprise whose income is dependant on obtaining government contracts. In a document titled, "Appeal Submission—Issue#2," the petitioner stated that while it was incorporated in 2003, "it did not acquire premises and begin significant operations as a company until May of 2006." This explanation leads the AAO to believe that the petitioner was not doing business as of August 2005, or one year prior to the filing of the instant petition. As such, the AAO concludes that the petitioner has failed to establish that it meets the requirements specified in 8 C.F.R. § 204.5(j)(3)(i)(D).

Third, 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 ultimately 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 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.

As a final note, the beneficiary repeatedly references the previously approved L-1 employment of the beneficiary. With regard to the beneficiary's L-1 nonimmigrant classification, it should be noted that, in general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by USCIS than nonimmigrant petitions. The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427.

In addition, 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. USCIS is not required to assume the burden of searching through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand in the present matter. The prior nonimmigrant approvals do not preclude USCIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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).

Furthermore, if the previous nonimmigrant petition was approved based on the same unsupported 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. 593, 597 (Comm. 1988). 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).

Finally, 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).

Accordingly, 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.