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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B4

FILE: [redacted] OFFICE: NEBRASKA SERVICE CENTER Date: MAR 04 2011

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 Delaware corporation seeks to employ the beneficiary as its chief operating officer. 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 an employee of the petitioning entity, or of its foreign affiliate or subsidiary, prior to his entering the United States; and 2) the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity. On appeal, counsel disputes both grounds for denial and submits a brief in support of her assertions.

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

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

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

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

The first issue in this proceeding is whether the beneficiary was an employee of the petitioning entity prior to entering the United States to work for the petitioner in the proposed position. In his decision dated June 1, 2009, the director determined that he was not. After reviewing the record in its entirety, the AAO concurs with the director's finding.

In support of the Form I-140, [redacted] the petitioner's vice president of administration, submitted a letter dated July 17, 2008 on the petitioner's behalf. [redacted] stated that the beneficiary was employed abroad as a director of the petitioning entity. The director subsequently issued a request for evidence (RFE) in which he asked the petitioner a series of questions in an attempt to determine whether the beneficiary was an employee of the foreign entity.

In response, the petitioner provided a letter from counsel dated April 20, 2009. Counsel claimed that the beneficiary owns only 25% of the petitioning entity, is subject to the control of the board of directors, and has been treated as an employee for all intents and purposes. The petitioner also provided a letter dated April 15, 2009 from [redacted], the petitioner's chief technology officer, on behalf of the petitioner. [redacted] also assured the director that the beneficiary is subject to the control of the petitioner's board of directors and is only a minority shareholder. [redacted] stated that the petitioner has always intended for the beneficiary to be an employee and explained that the beneficiary was paid as a consultant due to the tax benefits offered in South Africa. Additionally, the petitioner submitted the independent consulting agreement entered into on September 29, 2005 by the beneficiary and the petitioning entity

In a decision dated June 1, 2009, the director denied the petition, pointing to section ten of the agreement, which states that the beneficiary entered the agreement in the capacity of "an independent Consultant and not as an agent, partner, joint venturer, representative or employee of the Company or any of its affiliates and shall have no authority to bind or commit Company by or to any contract or otherwise." The director further noted that the beneficiary did not become an employee of the petitioning entity until March 1, 2007.

On appeal, counsel refers to an unpublished decision in which the AAO listed a variety of factors that are considered in order to determine the extent to which an employer has control over an individual and whether that individual can be deemed an employee. Counsel asserts that proper application of the AAO's prior decision will lead to the conclusion that the beneficiary had the requisite employer-employee relationship with the petitioner during his employment abroad. Counsel points to the original support letter from Mr. Lurie, which was submitted in support of the petition, as well as the petitioner's Articles of Incorporation, where the beneficiary was named as one of the petitioner's five members of the board of directors.

Counsel's arguments, however, are insufficient to overcome the director's conclusion, which was primarily based on the express language of an agreement that was entered into by the beneficiary and the petitioning entity in which the petitioner indicated that it did not intend to use the beneficiary's services abroad in the capacity of a company employee, but rather in the capacity of an independent consultant. The very fact that the petitioner is now disputing the express terms of the contract has resulted in a factual inconsistency, which the petitioner can only resolve by submitting independent objective evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, the AAO notes that, in general, 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)). Therefore, even if the AAO were to disregard the consulting agreement and to consider only the petitioner's claim that the beneficiary provided his services abroad as an employee of the petitioning entity, the claim alone would be insufficient without corroborating evidence. The AAO cannot, however, consider only the petitioner's claims when there is documentation on record, i.e., the express language of the consulting agreement, which directly contradicts those claims. The very fact that the consulting agreement clearly defines the capacity in which the beneficiary's services were being retained creates the presumption that the beneficiary was not an employee of the petitioning entity prior to the

expiration of the agreement. While the AAO acknowledges that the petitioner may rebut the presumption that was created by the terms of the consulting agreement, a rebuttal can only succeed in overcoming that presumption if it includes supporting documentary evidence. Here, such evidence was not submitted.

Furthermore, 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 in a managerial or executive capacity. 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." While 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, 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 was an "employee" who was employed abroad by the petitioner in a managerial or executive capacity. In reviewing section 2.2 of the consultant agreement, which discusses the scope of the services provided by the beneficiary, the AAO observes that the consultant, i.e., the beneficiary, retained the authority to determine when and where he would provide his services. The same section indicates that, while the beneficiary was subject to the covenant not to compete specified at section seven of the agreement, the beneficiary's services were not exclusive to the petitioner, thus indicating that the beneficiary was free to provide services elsewhere during the same time that he was providing services to the petitioner. After having considered these conditions together with the language found in section ten of the agreement, where the petitioner stated its intent to retain the beneficiary's services as a consultant rather than an employee of the company, the AAO finds that the beneficiary did not have an employer-employee relationship with the petitioning entity during the requisite one-year time period within the three years prior to the beneficiary's entry to the United States to be employed by the petitioning entity. On the basis of this initial conclusion, the instant petition cannot be approved.

The second 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 the petitioner's initial support letter executed by [redacted] the company's vice president of administration, the beneficiary's proposed employment was described as being both in a managerial and an executive capacity. [redacted] provided the following description of the beneficiary's proposed position:

> [The beneficiary] devises strategies and formulates technological and economic policies and goals in collaboration with other top executives to ensure that company objectives are met. He also oversees the commercialization of [the petitioner]'s proprietary processes for upgrading low-rank coal . . . . [He] directs the operations of [the petitioner] to ensure that day-to-day activities are conducted in accordance with company policies. Furthermore, he hires and oversees executives who in turn direct the activities of [the petitioner]'s various departments such as Technology, Strategy, Legal Services, and Administration/Accounting. [The beneficiary] also oversees budgets to ensure that programs are carried out as planned and to ensure the accuracy of financial reporting.

Additional supporting evidence included the petitioner's organizational chart in which the beneficiary and [redacted] were identified as the two highest ranking officials in the company in the positions of chief operating officer and president, respectively. The chart shows the beneficiary overseeing the positions of technology vice president, strategy vice president, vice president of legal, and an accounting/administration employee. The remainder of the chart consists of engineers, technicians, craftsmen, and construction personnel provided by [redacted]. The technology vice president is shown as the employee in charge of overseeing the Hazen Research employees.

The petitioner also provided a copy of its 2007 tax return, the beneficiary's IRS 2007 Form W-2, and the petitioner's quarterly wage statements for the last two quarters of 2007 and for the first two quarters of 2008.

These documents indicate that the beneficiary was the petitioner's sole employee during the reporting periods that directly preceded the filing of the Form I-140.

In the RFE, the director expressly instructed the petitioner to provide a more detailed description of the beneficiary's proposed employment, including a list of the beneficiary's proposed job duties and an approximate percentage of time that would be allocated to each item listed. The petitioner was asked to identify the individuals who would be under the beneficiary's supervision, including their job titles and position descriptions, and to submit its quarterly wage statements for the last two quarters in 2008.

In response, [redacted] letter dated April 15, 2009 included a percentage breakdown, which listed four key areas of concentration: supervising strategic planning for 15% of the time, supervising marketing and capitalization for 20% of the time, overseeing day-to-day business operations for 25% of the time, and supervising technical work for the remaining 40% of the time. [redacted] indicated that supervising strategic planning would include providing strategic direction, developing a plan for capital structure, and evaluating the U.S. market for business development; supervising marketing and capitalization would include researching and developing relationships with research partners, overseeing the implementation of a marketing plan, and developing business relationships; overseeing business operations would include advising and assisting with personnel and financial matters; and supervising technical work would include overseeing a feasibility study, the petitioner's ongoing current projects, and the work of the Hazen Research employees.

The petitioner also provided the requested wage reports, which show that the beneficiary was the petitioner's only employee at the time the Form I-140 was filed.

In the June 1, 2009 denial of the petitioner's Form I-140, the director determined that the petitioner failed to establish that the beneficiary's proposed employment would be within a qualifying managerial or executive capacity. While the director acknowledged the petitioner's use of subcontractors who provide directorial and other services, he found that the petitioner lacks employees other than the beneficiary himself to perform the daily operational tasks that are deemed as being outside of a managerial or executive capacity.

On appeal, counsel asserts that the director's conclusion is unjustified and points out that the beneficiary "is involved in extremely important and highly complex work" that has international significance. Counsel also points out that the beneficiary has assumed a leadership role in forging and overseeing contractual relationships with engineering firms and supervising two top-level subordinates—the chief technology officer and the treasurer/chief operating officer.

Counsel's statements, however, contain information that is inconsistent with evidence and information that was previously provided. Specifically, while counsel claims that one of the beneficiary's subordinates would be the chief operating officer, the AAO notes that this is the position title that was identified at part 6, item 1 of the petitioner's Form I-140 as the position that is being offered to the beneficiary. Additionally, the petitioner's quarterly wage statements indicate that the beneficiary has been and continues to be the petitioner's only employee. Thus, counsel's claim that the beneficiary would supervise two high-ranking officials is directly contradicted by the documentation presented by the petitioner. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980); *see also Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988), establishing the petitioner's

burden to resolve any inconsistencies in the record by independent objective evidence. Although a determination of the beneficiary's managerial or executive capacity is not limited to an analysis of the petitioner's organizational hierarchy, 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). Thus, while the AAO will consider other factors in determining whether the proposed employment falls within the parameters of what is deemed as being within a managerial or executive capacity, the overall lack of evidence of an adequate support staff cannot be overlooked. The petitioner cannot establish that the beneficiary primarily performs tasks within a qualifying managerial or executive capacity without establishing its ability to relieve the beneficiary from having to perform the petitioner's daily operational tasks. In the absence of an adequate support staff, the AAO is left without an understanding as to who, if not the beneficiary, would perform the non-qualifying job duties. As stated previously, 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. at 165.

Additionally, the AAO notes the significant role of the beneficiary's job description in determining whether the proposed employment qualifies under the definition of managerial or executive capacity. *See* 8 C.F.R. § 204.5(j)(5). In the present matter, the percentage breakdown that the petitioner provided in response to the director's RFE was vague in describing specific job duties and failed to convey a meaningful understanding of the tasks that the beneficiary would perform on a daily basis. The AAO notes that reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient. Published case law supports USCIS's emphasis on a detailed description of job duties, finding that 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). Generally stating that the beneficiary's time would be allocated to overseeing the petitioner's daily business operations and reviewing personnel and financial matters does not provide necessary information about the beneficiary's specific daily tasks. In other words, what specific activities does the beneficiary carry out in the process of overseeing personnel and financial matters? Moreover, with the lack of documentation establishing the existence of a support staff, the AAO is entirely unclear as to what personnel matters the beneficiary would be reviewing.

The petitioner was equally vague in providing information about the specific tasks associated with the beneficiary's oversight of the feasibility study and the petitioner's contractors and ongoing projects. The information provided does not explain how the beneficiary would carry out his oversight role. 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). When the petitioner fails to delineate the specific tasks that would be attributed to the beneficiary's proposed employment, USCIS is left without any means to determine that the primary portion of the beneficiary's time would be allocated to the performance of tasks within a qualifying managerial or executive capacity. Furthermore, when this considerable deficiency is reviewed in light of insufficient documentation establishing the existence of support personnel, a favorable determination cannot be made. Accordingly, as the petitioner has failed to provide the requisite evidence and information to support its claims, the AAO cannot affirmatively conclude that the beneficiary would primarily perform managerial or executive duties.

Furthermore, the record indicates that the petitioner cannot be deemed a multinational entity. The regulation at 8 C.F.R. § 204.5(j)(2) indicates that the term *multinational* applies to the qualifying entity, or its affiliate, or subsidiary, which conducts business in two or more countries, one of which is the United States. In the present matter, although the record shows that the petitioner operated abroad through the beneficiary, who conducted business on behalf of the beneficiary as an independent consultant, there is no indication that the petitioner, or its affiliate or subsidiary, continued to conduct business abroad after the beneficiary came to work directly for the petitioner in the United States. As such, the AAO cannot conclude that the petitioner is currently operating as a multinational entity.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(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.

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.