



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF Q-T-, INC.

DATE: SEPT. 22, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a data and device management and a security services provider, seeks to permanently employ the Beneficiary as its president chief executive officer under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director, Texas Service Center, denied the petition. The Director concluded that the Petitioner did not establish that it would employ the Beneficiary in the United States in a managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner disputes the Director's findings, asserting that the Director did not consider the work force of the entire organization, which the Petitioner relies upon to support the Beneficiary in his executive position.

Upon *de novo* review, we conclude that the Petitioner has provided sufficient evidence to overcome the Director's findings. Namely, we find that the job descriptions for the Beneficiary and support personnel, including outsourced service providers and the foreign parent entity's employees, indicate that it is more likely than not that the Beneficiary would be relieved from performing non-executive functions rather than primarily carry out daily operational tasks. Therefore, we will withdraw the Director's decision.

Notwithstanding our findings with regard to the Director's grounds for denial, we find that the Petitioner has not provided sufficient evidence to establish that the Beneficiary is an employee of and that he has an employer-employee relationship with the Petitioner. Therefore, we hereby remand this matter to the Director for further proceedings and entry of a new decision. A discussion of our findings is provided below.

**I. LEGAL FRAMEWORK**

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 the alien 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.

A United States employer may file Form I-140, Immigrant Petition for Alien Worker, to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager. A labor certification is not required for this classification.

The regulation at 8 C.F.R. § 204.5(j)(3) states:

(3) Initial evidence—

- (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

## II. EMPLOYER-EMPLOYEE RELATIONSHIP

As a threshold matter, we note that a petitioner must establish that an employer-employee relationship exists with a beneficiary in order to be eligible for the requested classification. Section 203(b)(1)(C) of the Act states that only aliens who were “employed” abroad and are coming to the United States “to continue to render services to the same employer or to an affiliate or subsidiary thereof” will merit classification as a multinational manager or executive. Also, section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), only permits an “employer desiring and intending to employ within the United States an alien” to file an immigrant petition seeking classification under section 203(b)(1)(C) of the Act. This is in contrast to provisions in the Act, such as section 204(a)(1)(E) and (H), which permit the alien to file an immigrant petition on behalf of himself or herself.<sup>1</sup>

Further, the term “executive capacity,” which has been codified and incorporated into the regulations at 8 C.F.R. § 204.5(j)(2), specifically applies solely to “the employee” of the “United States employer” filing the petition on behalf of a beneficiary. See section 101(a)(44)(B) of the Act; 8 C.F.R. § 204.5(j)(1), (2). Only upon establishing that the Petitioner and the Beneficiary meet this basic criteria, where the Petitioner is the employer and the Beneficiary is the employee on whose behalf the Petitioner files the Form I-140, would there be a need to conduct a further analysis of the given facts. If it is determined that an employer-employee relationship does not exist between the Petitioner and the Beneficiary, this deficiency, by itself, would serve as a sufficient basis for denying the petition.

Therefore, applying the above reasoning to the matter at hand, the Director must determine whether the Petitioner and the Beneficiary have an employer-employee relationship.<sup>2</sup> The Supreme Court

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<sup>1</sup> Of particular note, Congress enacted sections 203(b)(5) and 204(a)(1)(H) of the Act to permit an alien entrepreneur “engaging in a new commercial enterprise” to immigrate to the United States provided certain requirements were met, including employment creation.

<sup>2</sup> We note there is existing precedent case law, namely *Matter of Allen Gee, Inc.*, 17 I&N Dec. 296 (Comm’r 1979), and *Matter of Aphrodite*, 17 I&N Dec. 530 (Reg’l Comm’r 1980), that is relevant to the issue discussed here in this matter. In *Matter of Allen Gee, Inc.*, the Regional Commissioner determined that, as the petitioning corporation “is a legal entity distinct from its sole stockholder,” it may “petition for the beneficiary’s services.” Similarly, in *Matter of Aphrodite*, 17 I&N Dec. at 531, the Commissioner focused on the corporation’s separate legal existence from that of its shareholder and pointed out that the term “employee” was not used in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). However, both decisions were issued prior to the Immigration Act of 1990 (“IMMACT90”), which codified the definitions for managerial and executive capacity. See Pub. L. No. 101-649, § 123, 104 Stat. 4978, § 123 (1990). It is critical to note that both definitions in the Act now incorporate the term “employee” in referring to the beneficiary as one who assumes an assignment with an organization in a managerial or executive capacity. *Id.*; section 101(a)(44) of the Act. Therefore, while the holdings in *Matter of Allen Gee, Inc.* and *Matter of Aphrodite* were in line with the statutory provisions that were in effect at the time those decisions were issued, the changes that resulted from the enactment of IMMACT 90 indicate that our current contemplation of the term “employee” within the scope of an employer-employee relationship between the Petitioner and the Beneficiary is inherent to determining whether the Petitioner meets the current eligibility criteria. That said, these prior precedent decisions remain instructive as to whether a petitioner may seek classification for a beneficiary who has a substantial ownership interest in the organization; they were only

has determined that where the applicable federal law does not define “employee,” the term should be construed as “intend[ing] to describe the conventional master-servant relationship as understood by common-law agency doctrine.” *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (“*Darden*”) (quoting *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989) (“*C.C.N.V.*”). The Court stated:

“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 (quoting *C.C.N.V.*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Assocs. P.C. v. Wells*, 538 U.S. 440, 445, 447 & n.5 (2003). 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 Am.*, 390 U.S. 254, 258 (1968)) (emphasis added).

In *Clackamas*, the Supreme Court articulated the following factors to be weighed in determining whether an individual with an ownership interest is an employee:

- 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.

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superseded by statute to the extent they held or implied that such a beneficiary need not be an “employee” of the petitioning organization to qualify as a multinational manager or executive.

*Clackamas*, 538 U.S. at 449-450 (deferring to the factors enumerated in the Equal Employment Opportunity Commission's *Compliance Manual* § 605:0009 (EEOC 2000) (currently cited as § 2-III(A)(1)(d)) for determining "whether [a partner, officer, member of a board of directors, or major shareholder] acts independently and participates in managing the organization, or whether the individual is subject to the organization's control," and accordingly whether the individual qualifies as an employee).

As with the common-law factors listed in *Darden*, the factors relevant to the inquiry of whether a shareholder-director is an employee are likewise not exhaustive. *Clackamas*, 538 U.S. at 450 n.10 (citing *Darden*, 503 U.S. at 324). Not all of the listed criteria need be met; however, the fact finder must weigh its assessment of the combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee relationship. *See id.* at 448-449.

The fact that a "person has a particular title – such as partner, director, or vice president – should not necessarily be used to determine whether he or she is an employee or a proprietor." *Id.* at 450; *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988) (explaining that a job title alone is not determinative of whether one is employed in an executive or managerial capacity). Likewise, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, as was true in applying common-law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

As indicated above, it is critical to consider not only the factor of ownership, but also the factor of control when making this determination, as neither factor, by itself is sufficient to determine whether an employer-employee relationship exists between any given petitioner and beneficiary. In other words, the fact that a beneficiary owns the majority or all of a petitioning entity's shares does not automatically lead to the conclusion that the Petitioner and the Beneficiary do not have an employer-employee relationship.

After reviewing these factors of control under the common law of agency as articulated in *Darden* and *Clackamas* and applying them to the evidence presented in this matter, we find that the record lacks sufficient evidence to establish that the Petitioner will be a "United States employer" having an employer-employee relationship with the Beneficiary as an "employee" who would be employed by the Petitioner in a managerial or executive capacity. Namely, while the Petitioner provided an organizational chart depicting the Beneficiary's position of president and CEO as directly subordinate to the position of "Group CEO," the Petitioner then provided a second chart in response to the Director's request for evidence (RFE), which depicted the Beneficiary at the top-most position of the organizational hierarchy in his capacity as "Controlling Shareholder & Member of Board of Directors" and as the company president. This chart indicates that the "Group CEO" reports to the Beneficiary as "Controlling Shareholder & Member of Board of Directors" and that there is no one

within the Petitioner's organizational hierarchy who has a higher position than the Beneficiary himself in terms of heading the organization. We further point to the Petitioner's RFE response statement in which the Petitioner stated: "[The Beneficiary] ultimately maintains the authority and discretion to execute any changes to the company's Executive Team that he deems necessary. Therefore, he has ultimate authority with respect to the management and direction of the global organization."

The documentation provided concerning the Petitioner's ownership further complicates the analysis of the employer-employee relationship. According to the record, the Beneficiary owns 68% of the foreign entity. However, the ownership structure of the Petitioner is less clear. The Petitioner's 2014 IRS Form 1120S tax returns indicate that the Beneficiary owns 100% of the Petitioner, but the submitted stock certificates and CPA certificate indicate that the foreign entity owns 95% of the Petitioner, with a second company owning the remaining 5%. The true facts of the Petitioner's ownership are material to our inquiry into the employer-employee relationship and must be resolved prior to making a determination of eligibility in this case. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *See, Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Considered cumulatively, the Petitioner's statements and corroborating evidence indicate that the Beneficiary may own and control the petitioning entity wherein he will assume a role as the Petitioner's top-most official and will not be subordinate to or controlled by any other individual(s) or managing board of directors. There is no evidence that anyone other than the Beneficiary himself is in a position to exercise any control over the work he will perform or that the Beneficiary was hired or is subject to firing by another individual or board. Although the original organizational chart seemingly indicates the Petitioner's intent for the Beneficiary to be an employee subject to the control of the "Group CEO," the record lacks sufficient evidence to allow us to conclude that the Beneficiary actually reports to any higher authority. As such, we cannot find that the record establishes that the Beneficiary will be an "employee" of the Petitioner.

### III. CONCLUSION

We will remand this matter to the Director for a new decision. The Director shall request additional evidence to establish that the Petitioner and the Beneficiary have an employer-employee relationship and allow the Petitioner to submit such evidence within a reasonable period of time.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

*Matter of Q-T, Inc.*

**ORDER:** The decision of the Director, Texas Service Center, is withdrawn. The matter is remanded to the Director, Texas Service Center, for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of Q-T, Inc.*, ID# 10772 (AAO Sept. 22, 2016)