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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



B6

Date: **DEC 27 2011** Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a travel and tourism agency. It seeks to employ the beneficiary permanently in the United States as a Japanese speaking tour guide. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the beneficiary was an officer of the petitioning company and therefore, the petitioner was not the beneficiary's employer, and that the petitioner was not a United States employer. The petition was denied, accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact.¹ The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's August 27, 2008 denial, the single issue in this case is whether or not the petitioner is a bona fide United States employer of the beneficiary.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The DOL defines employer as follows:

Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN).

...

A labor certification can not be granted for an *Application for Permanent Employment Certification* filed on behalf of an independent contractor.

¹ The petitioner's representative, [REDACTED], was suspended from the practice of law on May 24, 2011. All representatives will be considered; however, counsel will not receive notice of these proceedings.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

See 20 C.F.R. § 656.3 (2010).

In determining whether there is an “employee-employer relationship,” 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)).

In considering whether or not one is an “employee,” U.S. Citizenship and Immigration Services (USCIS) must focus on the common-law touchstone of control. *Clackamas*, 538 U.S. at 450. Factors indicating that a worker is an “employee” of an “employer” are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; see also Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. See *Clackamas*, 538 U.S. at 448-449; cf. New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

It is important to note that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a 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 or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; New Compliance Manual at § 2-III(A)(1).

The *Clackamas* court considered the common law definition of the master-servant relationship, which focuses on the master's control over the servant. The court cites to definition of "servant" in the Restatement (Second) of Agency § 2(2) (1958): "a servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of services is subject to the other's control or right to control."³ *Id.* at 448. The Restatement additionally lists factors for consideration when distinguishing between servants and independent contractors, "the first of which is 'the extent of control' that one may exercise over the details of the work of the other." *Id.* (citing § 220(2)(a)). The court also looked to the EEOC's focus on control⁴ in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) and that the EEOC considered an employer can hire and fire employees, assign tasks to employees and supervise their performance, can decide how the business' profits and losses are distributed. *Id.* at 449-450.

³ Section 220, Definition of a Servant, in full states:

- (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.
- (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
 - a. The extent of control which, by the agreement, the master may exercise over the details of the work;
 - b. Whether or not the one employed is engaged in a distinct occupation or business;
 - c. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
 - d. The skill required in the occupation;
 - e. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
 - f. The length of time for which the person is employed;
 - g. The method of payment, whether by the time or by the job;
 - h. Whether or not the work is a part of the regular business of the employer;
 - i. Whether or not the parties believe they are creating the relation of master and servant; and
 - j. Whether the principal is or is not in business.

⁴ Additionally, as set forth in the recent Memorandum from [REDACTED]

[REDACTED] Including Third Party Site Placements, HQ 70/6.2.8, January 8, 2010, the memo looks to whether the employer has the "right to control" where, when and how the beneficiary performs the job. The memo considers many of the factors set forth in *Darden*, *Clackamas*, and the Restatement, including who provides the tools necessary to perform the job duties, control to the extent of who hires, pays and fires, if necessary, the beneficiary, and who controls the manner and means by which the beneficiary's work product is completed.

In this case, the director concluded that the petitioner was not a bona fide employer of the beneficiary because the beneficiary, under Schedule E of the petitioner's federal tax return for the year 2003, was listed as an officer of the corporation receiving \$18,000 in officer compensation. Based on this finding, the director concluded that the job offer was not *bona fide* and denied the petition, accordingly.

To show that the beneficiary is an employee and not an owner or officer of the petitioning corporation, the petitioner submitted the following evidence:

- Copies of Forms 1120, U.S. Corporation Income Tax Return, for the years 2003 through 2005;
- The beneficiary's Forms W-2 for 2004-2007;
- Copies of recruitment efforts (including copies of the in-house posting and newspaper advertisements);
- A signed statement dated February 6, 2008 from [REDACTED] stating that he is the sole stockholder and owner of the petitioning company;
- A signed statement dated February 6, 2008 from the petitioner's accountant and tax preparer, [REDACTED] stating that the payment of a salary to the beneficiary as an officer of the petitioning corporation in 2003 was a clerical error and that [REDACTED] is the sole stockholder of the corporation; and
- A copy of the petitioner's Corporate Minutes and Stock Certificate dated April 7, 2005 showing that [REDACTED] and sole shareholder of the petitioner.

The petitioner's 2003 tax return is dated August 26, 2004, and as described by the director, very clearly reflects that the beneficiary, whose social security number corresponds to the Forms W-2 received by the beneficiary from 2004 to 2007, was compensated as an officer of the corporation in the amount of \$18,000. The labor certification was filed on April 23, 2004. Thus, the beneficiary was an officer of the corporation at the time the labor certification was filed. The CPA who prepared the tax return stated that this was a clerical error. The petitioner did not submit any independent objective evidence to explain how an employee of the company appeared on the tax return of the petitioner, with specific information such as social security number, salary, and percentage of stock ownership, by clerical error. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The petitioner did not submit the 2003 tax return transcripts of the beneficiary.⁵ Nor did the petitioner submit corporate information dating back to July 30, 2003, the date of incorporation. The petitioner's failure to submit independent objective evidence resolving the inconsistency leads the AAO to conclude that the beneficiary was an officer of the company at the time of filing the Form ETA 750, and that the job offer is not bona fide. The petitioner has not overcome the decision of the director.

⁵ The beneficiary's tax return transcripts from 2004 to 2006 are included in the record.

Beyond the decision of the director, the AAO finds that the beneficiary is not qualified to perform the services of the position. Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, on the priority date – which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany v. Smith*, 696 F.2d, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Here, as previously noted, the Form ETA 750 was filed and accepted for processing by the DOL on April 23, 2004. The name of the job title or the position for which the petitioner seeks to hire is "Tour Guide." Under the job description, the petitioner wrote:

Plan itineraries and escort groups of Japanese tourists on tours of New York City.
Describe points of interest during tour. Arrange transportation, dining and other recreational activities for tour group members.

The DOL determined that the job description above is consistent with the O*NET-SOC job code 39-6021 (Tour Guides and Escorts).⁶ Under item 14 of the Form ETA 750 the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered. Under item 15 of the Form ETA 750, part B, signed by the beneficiary on April 20, 2004, she represented that she worked 40 hours a week for the petitioner from January 1, 2004 to present and for [REDACTED] from May 1999 to June 2003.

The record includes a letter dated December 20, 2006 from [REDACTED] signed by [REDACTED] Photographer, stating that the beneficiary, from May 1999 to June 2003, worked as a fashion model and tour guide for [REDACTED] and that she was responsible for escorting Japanese tour groups around New York City.⁷

⁶ The O'Net-SOC job code can be found online at: [REDACTED] (last accessed November 1, 2011).

⁷ [REDACTED] further stated that the beneficiary planned itineraries, described points of interest during the tour and arranged for transportation and other recreational activities for the tour group members.

The letter dated December 20, 2006 from [REDACTED] however, is inconsistent with other evidence in the beneficiary's file. Also of record is a Form ETA 750 that [REDACTED] filed on behalf of the beneficiary on January 14, 1998. In that ETA 750, [REDACTED], Inc. – the beneficiary's previous employer – sought to hire the beneficiary permanently as a high-fashion photographic model. The beneficiary, in part B of the Form ETA 750 that she signed on January 9, 1998, stated that she worked as a professional model for [REDACTED] from January 1986 to February 1993, for [REDACTED] from March 1993 to February 1997, and for [REDACTED] from February 1997 to the date she signed the form. The nature of the business of [REDACTED] was listed as high-fashion photographic model management.⁸ None of the beneficiary's job descriptions listed on that form included working for a travel or tourist agency.

The inconsistencies in the record, as described above, are material to the instant proceeding. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The record contains no evidence that resolves the inconsistencies in the record. In view of these inconsistencies, the AAO finds that the beneficiary is not qualified to perform the services of a tour guide as of the priority date. For this additional reason, the petition must be denied.

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 conducts appellate review on a *de novo* basis).

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.

⁸ In a subsequent ETA Form 9089 filed by the petitioner on behalf of the beneficiary, Rage Model Management, Inc. is represented as a travel and modeling business at the time of the beneficiary's employment on May 31, 1999.