

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D7

File: SRC 03 184 52443 Office: TEXAS SERVICE CENTER Date:

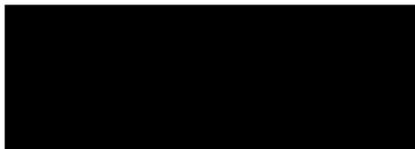
NOV 06 2007

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant visa petition seeking to extend the employment of its general manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a limited liability company organized under the laws of the State of Florida and is allegedly involved in the sale and distribution of three-wheeled motorcycles. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.¹

The director denied the petition concluding that the petitioner did not establish (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) that the petitioner is a qualifying organization because it did not establish that it is "doing business as an employer" as required by 8 C.F.R. § 214.2(l)(1)(ii)(G)(2).

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel to the petitioner asserts that the director erred and that the beneficiary's duties are primarily those of an executive or manager. Counsel further argues that the petitioner did business as an employer. Counsel submits a brief and additional evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment

¹According to Florida state corporate records, the petitioner's corporate status in Florida was "administratively dissolved" on September 15, 2006. Therefore, since the corporation may not carry on any business except that necessary to wind up and liquidate its affairs, the company can no longer be considered a legal entity in the United States. See Fla. Stat. 607.1405 (2006). Accordingly, if this appeal were not being dismissed for the reasons set forth herein, this would call into question the petitioner's continued eligibility for the benefit sought.

abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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.

The petitioner does not clarify in the initial petition whether the beneficiary will be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

The petitioner described the beneficiary's job duties in the Form I-129 as follows:

Manage [the petitioner] in developing its import, marketing, sales and distribution business; establish markets and sales network throughout the U.S. for "Boom Trikes[.]"

Counsel to the petitioner also submitted a letter dated June 19, 2003 which explains that the beneficiary will be remunerated by the foreign employer and that the petitioner "has employed a marketing representative." While the petitioner's 2002 Form 1120, U.S. Corporation Income Tax Return, indicates that the petitioner had no employees in 2002, the petitioner submitted a letter dated April 30, 2003, which claims that it has hired [REDACTED] as a "marketing representative." This claim is repeated in a document titled "History Glance Enterprises July 2002 – May 2003" which states that the petitioner began employing a part-time "marketing assistant" named [REDACTED] in May 2003 as well as three independent sales representatives. The petitioner also claimed to employ one person in its Form I-129.

On October 27, 2004, the director requested additional evidence. The director requested, *inter alia*, the petitioner's federal and state wage reports, Forms 1099 for the independent contractors, and descriptions of all subordinate employees.

In response, the petitioner submitted a federal wage report, Form 941, for the second quarter of 2003 indicating that the petitioner employed one person during that timeframe and only during the third month of that quarter, i.e., June 2003. This is also the month in which the petition was filed. The Form 941 further indicates that the petitioner paid \$1,162.00 in wages in that quarter. The petitioner did not submit a corresponding Florida wage report even though this was specifically requested by the director.

The petitioner also submitted a letter from its accountant dated December 15, 2003 which repeats the petitioner's claim that it hired a part-time "sales/marketing employee" in May 2003 with "an annual salary of \$7,000.00." However, the petitioner also submitted an organizational chart and job description which identify the marketing employee as [REDACTED]. The employee identified as the marketing representative in the initial petition, does not appear on the organizational chart. According to [REDACTED]'s job description, [REDACTED] became ill in 2003 and his wife, [REDACTED], ceased working for the petitioner in the third quarter of 2003 to care for him. However, the job description for [REDACTED] claims that she is "now back on payroll." It must be noted that the petitioner does not address why it asserted that [REDACTED] was hired in May 2003 but his wife, [REDACTED], was apparently the individual employed by the petitioner, albeit for less than a one-month time period.

Regardless, the job description for [REDACTED] claims that she will perform marketing tasks. While the petitioner identifies other persons on the organizational chart and in the list of job descriptions, the record does not indicate that these other individuals were employed by the petitioner at any time prior to the filing of the petition in June 2003.

On March 30, 2004, the director denied the petition. The director concluded that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel asserts that the beneficiary will be employed as an executive or manager. In support, counsel submits additional evidence primarily concerning the petitioner's purported business activities after the filing of the petition. Counsel also submitted copies of [REDACTED]'s 2003 Form W-2 which indicates that the only compensation paid to this employee was the \$1,162.00 claimed in the Form 941 for her one month of employment in June 2003. The petitioner's averment that she was "back on payroll" in late 2003 appears to have been false. Moreover, the 2002 Forms W-2 and the petitioner's 2002 Form W-3 indicate that the petitioner never employed [REDACTED].

Upon review, the petitioner's assertions are not persuasive.

As a threshold matter, it must be noted that the petitioner submitted substantial documentation on appeal and in response to the director's Request for Evidence that concerns the petitioner's business activities after the filing of the instant petition on June 20, 2003. To the extent this evidence concerns post-petition business activity, this evidence will not be considered by the AAO. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Title 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in Citizenship and Immigration Services (CIS) regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the United States operation has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. As explained above, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner's description of the beneficiary's job duties has failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes lofty duties does not establish that the beneficiary will actually perform managerial duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Likewise, it appears that the beneficiary will be primarily performing non-qualifying administrative or operational tasks which will not rise to the level of being managerial or executive in nature. For example, the petitioner states that the beneficiary will develop the petitioner's "import, marketing, sales and distribution business" and "establish markets and sales network." However, marketing, sales, importation, and product distribution duties constitute administrative or operational tasks when the tasks inherent to these duties are performed by the beneficiary. The record as a whole, which includes evidence that the beneficiary directly corresponds with potential customers via email, indicates that the beneficiary will be performing these non-qualifying tasks.

Moreover, as the organizational chart, wage reports, and job descriptions for the subordinate employees fail to identify any employees or contractors who will relieve the beneficiary of the need to perform the non-qualifying tasks inherent to both the sales, marketing, and distribution duties as well as to the management of the business in general, it must be concluded that he will perform these tasks. While the petitioner has claimed that it employs a part-time marketing assistant, the record confirms that this employee worked for the petitioner for less than one month. The petitioner also failed to provide any evidence confirming its employment of independent contractors or other employees even though specifically requested by the

director. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As the petitioner has not established how much time the beneficiary will devote to performing non-qualifying tasks, it cannot be confirmed that he will be "primarily" employed as a manager or executive. 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).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As explained in the organizational chart, wage reports, and job descriptions, the beneficiary appears to supervise no employees. The only person employed by the petitioner appears to have been Ruth Birgy, and the record indicates that she only worked for the petitioner for a few weeks in June 2003. As of June 20, 2003, and for the reasons discussed *infra*, it does not appear that the beneficiary would have had any subordinate employees. Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.²

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to

² While the petitioner has not argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(1)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties will be managerial functions, if any, and what proportion will be non-managerial. Also, as explained above, the record establishes that the beneficiary will be primarily engaged in performing non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties will be managerial, nor can it deduce whether the beneficiary will be primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will be acting primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary does on a day-to-day basis. Moreover, as explained above, it appears that the beneficiary will primarily perform non-qualifying administrative or operational tasks. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.³

It is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* In this matter, the record is rife with inconsistencies regarding its employment of subordinate workers. As outlined above, the petitioner originally asserted in its petition, which was filed on June 20, 2003, that it hired [REDACTED] as a part-time "marketing assistant" in May 2003. However, both the petitioner's response to the director's Request for Evidence, and the evidence submitted on appeal, confirm that [REDACTED] was never employed by the petitioner in 2003. It is unclear why the petitioner would claim on June 20, 2003 that it has been employing someone for almost two months when, in fact, it had never employed this person. In fact, the record confirms that the petitioner actually paid [REDACTED] wife, [REDACTED] for a short period of time in June 2003. Again, it is unclear why [REDACTED] relationship with the petitioner was not disclosed in the original petition filed on June 20, 2003 when, according to the wage reports submitted in response to the Request for Evidence, she rendered services to the petitioner only during that month and that she was paid \$1,162.00. Moreover, it is unclear why the petitioner claims in the job descriptions provided in response to the Request for Evidence that [REDACTED] came "back on payroll" after

³ It is noted that counsel to the petitioner cited the unpublished opinion in *Matter of Irish Dairy Board*, A28-845-42 (AAO Nov. 16, 1989), in support of her contention that the beneficiary is primarily employed as an executive or manager. In that decision, the AAO recognized that the sole employee of the petitioner could be employed primarily as a manager or executive provided he or she is primarily performing executive or managerial duties. However, counsel's reliance on this decision is misplaced. First, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Moreover, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Second, as explained above, the petitioner has not established that the beneficiary will be primarily employed in an executive or managerial capacity. This is paramount to the analysis, as a beneficiary may not be classified as a manager or an executive if he or she is not primarily performing managerial or executive duties regardless of the number of people employed by the petitioner. Therefore, as the petitioner has not established this essential element, the decision in *Matter of Irish Dairy Board* would be irrelevant even if it were binding or analogous.

the third quarter of 2003 when, according to the Forms W-2 and W-3 for 2003, she was not paid any more compensation than what was reported in June 2003. Overall, the petitioner's representations regarding its employment of a subordinate staff are rife with unresolved inconsistencies. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Accordingly, in this matter, the petitioner has failed to establish that the beneficiary will be primarily performing managerial or executive duties, and the petition may not be approved for that reason.

The second issue in the present matter is whether the petitioner has established that it is "doing business . . . as an employer in the United States" and, thus, still has a qualifying relationship with the foreign entity.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) states that a petition to extend a "new office" petition filed on Form I-129 shall be accompanied by:

Evidence that the United States and the foreign entity are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section[.]

Title 8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section" and "is or will be doing business . . . as an employer in the United States." A "subsidiary" is defined in pertinent part as a legal entity, which includes limited liability companies, "of which a parent owns, directly or indirectly, more than half of the entity and controls the entity."

In this matter, the petitioner, a limited liability company, asserts in the Form I-129 that it is 90% owned by the foreign employer and that the foreign employer is 100% owned by the beneficiary. It also asserts that the beneficiary has been, and will be, compensated by the foreign employer and that the petitioner employs one person. As outlined above, however, the record contains numerous inconsistencies regarding its staffing, and it cannot be confirmed that the petitioner has ever truly employed anyone.

On March 30, 2004, the director denied the petition. The director concluded that the petitioner did not establish that the "U.S. entity is 'doing business as an employer'" as required for qualifying organizations by 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). On appeal, counsel asserts that the petitioner has been doing business as an employer.

Upon review, the petitioner's assertions are not persuasive.

As properly noted by the director, the definition of "qualifying organization" includes a requirement that the petitioner establish that it "is or will be doing business . . . as an employer in the United States." Therefore, not only does the definition of "qualifying organization" require the petitioner to establish that it is or will be "doing business" as defined in 8 C.F.R. § 214.2(l)(1)(ii)(H), it must also establish that it is or will be doing business as an

employer. In this matter, the record does not establish that the petitioner is, or will be, employing anyone. As further discussed herein, the beneficiary is not, and will not likely become, an "employee" of the petitioner.⁴ Moreover, the record does not establish that the workers listed in the organizational chart, including [REDACTED] have been, or will ever become, employees of the petitioner. The fact that the petitioner has identified [REDACTED] in a Form 941 as an "employee" does not, alone, establish that she was employed by the petitioner. Not only is the record rife with unresolved inconsistencies regarding whom was employed by the petitioner in 2003, the mere inclusion of a person on a wage report and the payment of money to that person does not alone establish that that person is an "employee" for purposes of the Act and the regulations.

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 L-1 classification. Section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L), 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 Citizenship and Immigration Services (CIS) has defined the terms "employee," "employer," or "employed" by regulation for purposes of the L-1 classification. *See, e.g.*, 8 C.F.R. § 204.5 and 8 C.F.R. § 214.2(l). Therefore, for purposes of the L-1 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

⁴ A beneficiary's ongoing receipt of remuneration from a foreign source, and not from the petitioner, is an important factor in determining whether a beneficiary may qualify as an L-1A intracompany transferee as it must be established that the beneficiary will be controlled by, and will render services to, the United States entity. *See Matter of Penner*, 18 I&N Dec. 49 (Comm. 1982); *but see Matter of Pozzoli*, 14 I&N Dec. 569 (BIA 1974). While the 1974 decision in *Matter of Pozzoli* held that the origin of a beneficiary's remuneration is not relevant in determining a beneficiary's eligibility as an L-1A intracompany transferee, the current validity of this decision is questionable in light of the 1982 decision in *Matter of Penner* which clearly determined that the origin of a beneficiary's compensation, while not determinative, is at least relevant.

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)).⁵

Therefore, in this matter, the petitioner was obligated to establish that it is doing business, or will be doing business, in the United States as an "employer" in accordance with the common-law agency definition outlined above. The "tax treatment" of the worker, e.g., the listing of an employee in a Form 941, is but one factor in examining whether a master-servant relationship ever existed. The petitioner was also obligated to establish that it had control over the employee and to address those other indicia of employment in order to carry its burden of proof. In this matter, because the evidence submitted by the petitioner regarding its conduct of business as an "employer" was insufficient to establish that it is or will employ workers as defined above, the director properly determined that the petitioner failed to establish that it is a qualifying organization as defined in 8 C.F.R. § 214.2(l)(1)(ii)(G)(2).

While the legacy Immigration and Naturalization Service (INS) has in the past considered the issue of employment in the context of L-1A intracompany transferee petitions, these decisions, which both predate the Supreme Court's *Darden* decision by over a decade, can be distinguished from the present matter. The decisions in *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980) (hereinafter *Aphrodite*) and *Matter of Allan Gee, Inc.*, 17 I&N Dec. 296 (Reg. Comm. 1979) (hereinafter *Allan Gee*), both primarily addressed the ability of corporate entities to file petitions on behalf of beneficiaries who have substantial ownership stakes in those entities. The soundness of this particular conclusion is not being

⁵ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1000 (1994). However, in the case of the above-cited sections of the Immigration and Nationality Act, there is no indication that Congress intended for the undefined terms "employer" or "employed" to have a broader application than that of the corresponding undefined term "employee." Therefore, in the absence of an intent by Congress to impose broader definitions, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* statutory construction test, apply to the terms "employee," "employer," and "employed" as used in 8 C.F.R. § 214.2(l), 8 U.S.C. § 1101(a)(15)(L), 8 U.S.C. § 1101(a)(44); and 8 U.S.C. § 1153(b)(1)(C). That being said, there are instances in the Act where Congress may have intended a more defined application of the term "employer" than what is encompassed in the conventional master-servant relationship. See, e.g., section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

questioned and is not at issue in the present matter. However, these decisions fail to directly address how, or whether, petitioners must establish that beneficiaries are bona fide "employees" of the petitioners. The decisions also fail to address how, or whether, petitioners must establish that they are bona fide "employers" of employees.

In the 1980 *Aphrodite* decision, the INS Commissioner addressed whether a petitioner may seek to classify a beneficiary as an intracompany transferee even though the beneficiary was a part owner of the foreign entity and, apparently, not an "employee" of either the foreign entity or the petitioner. The district director and regional commissioner determined that the beneficiary could not be classified as an intracompany transferee because "he is 'an entrepreneur, a speculative investor, and not an employee of an international company.'" 17 I&N Dec. at 530. Relying on *Matter of M--*, 8 I&N Dec. 24 (BIA 1958), the Commissioner disagreed, declined to require that intracompany transferees be "employees," and specifically noted that the word "employee" is not used in section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). 17 I&N Dec. at 531. The Commissioner further reasoned that adopting the word "employee" would exclude "some of the very people that the statute intends to benefit: executives" and noted that the *Webster's New Collegiate Dictionary* did not define "employee" to include "executives."

However, the *Aphrodite* decision, while otherwise sound, predates both the 1990 codification of the definitions of "managerial capacity" and "executive capacity" in 8 U.S.C. § 1101(a)(44), Pub. L. No. 101-649, § 123, 104 Stat. 4978, § 123 (1990), and the Supreme Court's decision in *Darden*. As the definitions of both "managerial capacity" and "executive capacity" now clearly use the word "employee" in describing intracompany transferee managers and executives, the commissioner's decision in *Aphrodite* declining to impose an employment requirement upon intracompany transferees, while correct at the time, ceased being a valid approach to determining an alien's eligibility for L-1 classification in 1990.⁶ Furthermore, given that Congress did not define the term "employee" in codifying the definitions of "managerial capacity" and "executive capacity," the Supreme Court instructs that one should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Darden*, 503 U.S. at 322-323. Therefore, while the *Aphrodite* decision remains instructive as to whether a petitioner may seek L-1 classification for a beneficiary having a substantial ownership interest in the organization, the determination that an intracompany transferee employed in an executive capacity need not be an "employee" has been superceded by statute. Finally, the AAO notes that the Commissioner's reliance on the dictionary definition of the term "employee" is neither binding nor persuasive when compared to the common law treatment of the complex subject.

Moreover, in the 1979 *Allan Gee* decision, the acting regional commissioner of INS determined that the petitioning corporation could seek L-1 classification for the beneficiary even though the beneficiary was the sole stockholder of the petitioner. 17 I&N Dec. at 298. Relying on the basic legal tenet that corporations are

⁶ INS adopted regulations substantially similar to the definitions of "managerial capacity" and "executive capacity" ultimately codified in 1990 at 8 U.S.C. § 1101(a)(44). See 8 C.F.R. §§ 214.2(l)(1)(ii)(B)-(C); 52 F.R. 5738-01 (Feb. 26, 1987). These regulations, which also require that L-1 managers and executives be employees, were generally upheld as consistent with the Act even prior to the 1990 codification of these definitions. See *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472 (5th Cir. 1989). Therefore, an employment requirement was arguably imposed upon managers and executives seeking L-1 classification as early as 1987.

separate and distinct from their stockholders, INS correctly concluded that the Act does not prohibit a petitioning corporation from employing, and petitioning for, a beneficiary who happens to own all of a petitioner's stock. 17 I&N Dec. at 297-298. Importantly, however, the decision does not address how, or whether, petitioners must establish that such beneficiaries are bona fide "employees" of the petitioners. It is unclear why the acting regional commission did not take this crucial next step in the analysis. While it is correct that a petitioner may employ and seek L-1 classification for a beneficiary who happens to have a significant ownership interest in a petitioner, this does not automatically mean that such beneficiaries are bona fide employees. The *Allan Gee* decision simply fails to address the issue being addressed in the instant matter.

Regardless, as with the *Aphrodite* decision, the *Allan Gee* decision was decided approximately 13 years before the Supreme Court's decision in *Darden*. As explained above, the *Darden* decision indicates that where Congress fails to define the term "employee," courts should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Darden*, 503 U.S. at 322-323. As indicated above, the Act fails to define the terms "employee," "employer," and "employed" for L-1 classification purposes. Therefore, while a petitioner, which is solely or primarily owned by a beneficiary, may file a petition for that beneficiary as an L-1A intracompany transferee, the question of whether such a beneficiary will truly be an "employee" as now required by the Act is a separate and independent matter which will be scrutinized on a case-by-case basis utilizing the analysis set forth by the Supreme Court in *Darden*, 503 U.S. at 323-324, and *Clackamas*, 538 U.S. at 449-450.

In other words, while a petitioner may file a petition for a beneficiary who is its sole or primary owner, this does not necessarily mean that the beneficiary will be a bona fide "employee." See *Clackamas*, 538 U.S. 440. In fact, courts employing this analysis in considering whether an owner of an "employer" is also an "employee" have concluded, in certain contexts, that the owner is not an "employee." See, e.g., *Ziegler v. Anesthesia Associates of Lancaster, Ltd.*, 74 Fed. Appx. 197, 2003 WL 22048003 (3rd Cir. 2003) (unpublished); *Solon v. Kaplan*, 398 F.3d 629 (7th Cir. 2005). Using similar analysis, CIS could reasonably conclude that beneficiaries who own and control a petitioning corporation or partnership, as in the cases of *Allan Gee Inc.* and *Aphrodite Investments Limited*, might not, given the facts of individual cases, be "employees" of those petitioners.

Therefore, in considering whether or not one is an "employee" or an "employer," CIS will 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).

Within the context of L-1 nonimmigrant petitions, 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*, 538 U.S. at 449-450; 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*).

Again, it is important to note that this list need not be exhaustive and such questions cannot be decided in every case by a "shorthand formula or magic phrase." *Id.* at 450 (citing *Darden*, 503 U.S. at 324). Moreover, in applying the above test, the mere 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." *Clackamas*, 538 U.S. at 450; cf. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988) (stating 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).

In this matter, the petitioner has not established that it "is or will be doing business . . . as an employer in the United States." First, as explained above, the record is so rife with inconsistencies regarding the petitioner's alleged staffing that it calls into question whether the petitioner had ever employed anyone in any capacity. For this reason alone, the petitioner has not established that it is, or will be, doing business as an employer. Second, applying the *Darden* and *Clackamas* factors enumerated above, the petitioner has not established that it has, or will have, a "conventional master-servant relationship" with one or more workers as understood by common-

law agency doctrine. While the petitioner claims that [REDACTED] was employed in June 2003, the petitioner has not only failed to establish that this person was employed at the time the petition was filed, the petitioner has not established this person was a bona fide "employee." [REDACTED] was paid a total of \$1,162.00 for less than one month's worth of services. The petitioner failed to describe what, exactly, [REDACTED] did in June 2003, and it does not appear that this was a "continuing relationship." It also does not appear that [REDACTED] provided these services on the "employer's premises" or that the petitioner set her hours or provided tools and equipment. The record indicates that [REDACTED] lived in Crossville, Tennessee, while the petitioner's place of business was in Ft. Myers, Florida. Therefore, the petitioner has not demonstrated that there were enough factors of "control" present to establish that [REDACTED] was an "employee." Also, when those competing factors which indicate that the beneficiary was actually an independent contractor or service provider are weighed against any indicia of "control," such as the reporting of [REDACTED]'s wages on a Form 941, it is clear that the beneficiary was more likely than not a short-term independent contractor.

Furthermore, applying the *Darden* and *Clackamas* factors enumerated above, the petitioner has not established that it has, or will have, a "conventional master-servant relationship" with the beneficiary as understood by common-law agency doctrine. While the petition contains some serious inconsistencies regarding the petitioner's ownership and control (*see infra*), it has been alleged that the foreign entity is owned and controlled primarily by the beneficiary. The foreign entity, in turn, allegedly owns and controls the petitioner. Therefore, accepting the petitioner's characterizations as true, the beneficiary is the principal owner and operator of both the petitioner and the foreign entity.

While this does not limit the petitioner's ability to file a petition on behalf of the beneficiary as an intracompany transferee, the petitioner has nevertheless failed to establish that the beneficiary will be an "employee" of the petitioner or that the petitioner "is or will be doing business . . . as an employer in the United States." First, as explained above, the beneficiary receives his remuneration from abroad and not from the petitioner. Therefore, the petitioner does not withhold taxes or provide any salary or benefits to the beneficiary. Second, the petitioner does not appear to "control" the beneficiary's work performance. The petitioner has not submitted any employment contracts or other documents, which could establish that the beneficiary is controlled by someone other than himself. To the contrary, it appears that the beneficiary, as the owner and operator of the business, has plenary authority to direct his own work performance. It does not appear that his "employment" can be terminated; he does not appear to be supervised by anyone; he does not report to a higher authority; and he has sole influence over the organization. Finally, the petitioning organization appears to be a corporation in name only; there are few indicia that the corporation exists as a functional entity with an established organization and personnel structure outside of the beneficiary's position.

Applying the relevant factors, it appears that none of the elements of control vital to establishing that the beneficiary has a "conventional master-servant relationship" with the petitioner are present. Therefore, the petitioner has not established that the beneficiary is an "employee" and has not established that it is or will be doing business as an employer in the United States. As indicated above, a petitioner that fails to establish that it is or will be doing business as an employer in the United States and in at least one other country will not meet the definition of a "qualifying organization" under the regulations. 8 C.F.R. § 214.2(l)(1)(ii)(G)(2).

Beyond the decision of the director, the petitioner also failed to establish that it is a qualifying organization because the record contains unresolved inconsistencies regarding its ownership and control. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a

qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In this matter, the petitioner asserts in the Form I-129 that it is 90% owned by the foreign employer. The petitioner also asserts in the Form I-129 that the foreign employer is 100% owned by the beneficiary. However, the petitioner avers in its 2002 Form 1120 that it is 100% owned by the foreign employer. Moreover, the foreign employer's tax advisor indicates in a letter dated November 14, 2003 that the foreign employer is 80% owned by the beneficiary. The petitioner does not offer any explanation for these serious inconsistencies in the record. Once again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

Accordingly, the petitioner has not established that it and the foreign entity are still qualifying organizations. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has also failed to establish that the beneficiary has at least one continuous year of full-time employment abroad with a qualifying organization as required by 8 C.F.R. § 214.2(l)(3)(iii). As explained above, the petitioner has failed to establish that the beneficiary has a "conventional master-servant relationship" with the petitioner. For the same reasons, the petitioner has failed to establish that the beneficiary had a "conventional master-servant relationship" with the foreign entity. As indicated above, the beneficiary allegedly owns and controls the foreign entity. The petitioner has not submitted any employment contracts or other documents, which could establish that the beneficiary was controlled abroad by someone other than himself. To the contrary, it appears that the beneficiary, as the owner and operator of the business, had plenary authority to direct his own work performance. It does not appear that his "employment" could have been terminated; he did not appear to have been supervised by anyone; he did not report to a higher authority; and he had sole influence over the organization. Therefore, the petitioner has not established that the beneficiary was a bona fide "employee" abroad, and for this additional reason the petition may not be approved.

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER:

The appeal is dismissed.