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U.S. Citizenship  
and Immigration  
Services

B7



FILE: WAC 07 193 52752 Office: CALIFORNIA SERVICE CENTER Date: DEC 01 2008

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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)

ON BEHALF OF PETITIONER:  
[Redacted]

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.

  
John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the case will be remanded for further consideration and action, which shall be certified to the AAO for review.

The petitioner filed this nonimmigrant visa petition seeking to employ the beneficiary as its "president" 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 California and is allegedly a producer of packaging materials.

The director denied the petition concluding that the petitioner failed to establish that the petitioner and the foreign employer are qualifying organizations. Specifically, the director determined that the petitioner is not an "affiliate" as defined by the regulations because it has not been established that it and the foreign employer are owned by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

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 asserts that the petitioner and the foreign employer are "affiliates" as defined by the regulations. In support, counsel submits additional evidence pertaining to the beneficiary's alleged acquisition of additional ownership interests in the petitioner.

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 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 primary issue in the present matter is whether the petitioner has established that it and the foreign employer are qualifying organizations.

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed United States employer are the same employer (i.e., one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). An "affiliate" is defined in part as "[o]ne of two subsidiaries both of which are owned and controlled by the same parent or individual." 8 C.F.R. § 214.2(l)(1)(ii)(L)(1). An "affiliate" is also defined as "[o]ne of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity." 8 C.F.R. § 214.2(l)(1)(ii)(L)(2).

In this matter, the petitioner asserts that both it and the foreign employer are majority owned by the beneficiary. In support, the petitioner submitted its operating agreement, relevant organizational minutes, and ownership certificates collectively indicating that the beneficiary owns a 51% interest. The petitioner also submitted translated organizational documents pertaining to the foreign employer indicating that the beneficiary owns a 95% interest in the Mexican company.

Nevertheless, on July 23, 2007, the director requested additional evidence. The director requested, *inter alia*, a copy of the foreign entity's "annual report," a "detailed list" of all owners of the petitioner and the foreign company and "what percentages they own," evidence pertaining to the acquisition of the beneficiary's ownership interest in the petitioner, copies of "stock certificates," and a copy of a "stock ledger."

In response, counsel submitted an annual report, lists of owners for both entities, a "stock ledger," and wire transfer documents.

On December 12, 2007, the director denied the petition concluding that the petitioner failed to establish that the petitioner and the foreign employer are qualifying organizations. Specifically, the director determined that the petitioner is not an "affiliate" as defined by the regulations because it has not been established that it and the foreign employer are owned by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

On appeal, counsel asserts that the petitioner and the foreign employer are "affiliates" as defined by the regulations. In support, counsel submits additional evidence pertaining to the beneficiary's alleged acquisition of additional ownership interests in the petitioner. Specifically, counsel claims that the beneficiary now owns a 95% interest in both entities.

Upon review, the AAO agrees that the petitioner has established that it is more likely than not that it and the foreign employer are owned and controlled by the same individual, and are thus "affiliates." Accordingly, the director's decision shall be withdrawn. While the regulations define affiliate in part as "[o]ne of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling

approximately the same share or proportion of each entity," an affiliate is also defined as "[o]ne of two subsidiaries both of which are owned and controlled by the same parent or individual." 8 C.F.R. § 214.2(l)(1)(ii)(L). It is the latter definition which applies to this matter. Therefore, if one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners. *See, e.g., Matter of Tessel, Inc.*, 17 I&N Dec. 631 (Assoc. Comm. 1981). In this matter, the petitioner has established that it is more likely than not that the beneficiary owns and controls, through his majority interests, both the petitioner (51% ownership) and the foreign entity (95% ownership) and, thus, the entities are "affiliates" as defined by the regulations.<sup>1</sup>

Accordingly, the petitioner has established that it is more likely than not that it and the foreign employer are principally owned and controlled by the same individual, and the director's decision shall be withdrawn.

However, upon review, the petitioner has not submitted sufficient evidence to establish eligibility for the L-1A classification. In this matter, given the petitioner's description of its business organization and the beneficiary's proposed relationship to this business, it appears more likely than not that the beneficiary will not be an "employee" of the United States operation. As explained in 8 C.F.R. § 214.2(l)(3)(ii), the petitioner must establish that the beneficiary will be primarily "employed" as an executive or manager. 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.

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

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<sup>1</sup>It is noted that counsel's attempt on appeal to supplement the record with evidence that the beneficiary acquired an additional 44% ownership interest in the petitioner after the filing of the instant petition was inappropriate and 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). However, as the record establishes that it is more likely than not that the petitioner and the foreign employer are "affiliates" without the AAO needing to consider the additional evidence submitted on appeal, the director's decision will be withdrawn.

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)).

Therefore, in considering whether or not the beneficiary in this matter will be an "employee," Citizenship and Immigration Services (CIS) should 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 the instant L-1 petition, because the beneficiary is a partner, officer, member of a board of directors, or a major shareholder or interest owner, the beneficiary may only be defined as an "employee" if he 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 the beneficiary, 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).

Consequently, since the beneficiary is a primary owner of the petitioner, the director is directed to review the record, request pertinent additional evidence regarding the petitioner's control over the beneficiary and his prospective employment, and render a new decision after reviewing this evidence.

Also, while not addressed by the director, the petitioner provided insufficient evidence to establish that the beneficiary was "employed" abroad in a managerial or executive capacity. Again, because the beneficiary appears to be the primary owner of the foreign employer, the director shall request pertinent additional evidence regarding the foreign employer's control over the beneficiary and his employment abroad.

Furthermore, even if the beneficiary is, or will be, an "employee," the record is not persuasive in establishing that the beneficiary performed primarily managerial or executive duties abroad or will perform primarily managerial or executive duties in the United States. In support of its petition, the petitioner submitted vague and non-specific job descriptions which fail to establish what the beneficiary did on a day-to-day basis abroad or will do in the United States. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d Cir. 1990). Finally, while the petitioner listed the foreign employer's workers, it did not specifically describe their duties. Absent detailed descriptions of the duties of both the beneficiary and his purported subordinates, it is impossible for CIS to discern whether the beneficiary was "primarily" engaged in performing managerial or executive duties abroad or whether he supervised and controlled other managerial, supervisory, or professional workers. *See* sections 101(a)(44)(A) and (B) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

Therefore, the director is directed to review the record, request pertinent additional evidence, and render a new decision after reviewing this evidence.

For these additional reasons, the appeal may not be sustained, and the matter must be remanded to the director for further action.

**ORDER:** The decision of the director is withdrawn. The matter is remanded to the director for further action consistent with the above and entry of a new decision, which shall be certified to the AAO for review.