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U.S. Citizenship
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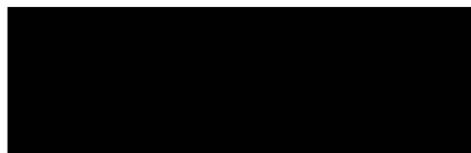


FILE: WAC 07 233 52324 Office: CALIFORNIA SERVICE CENTER Date: FEB 01 2008

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:



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, 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 The decision of the director will be withdrawn and the case will be remanded for further consideration and action, and the entry of a new decision, which shall be certified to the AAO for further review.

The petitioner filed this nonimmigrant visa petition seeking to employ the beneficiary as its chief executive officer to open a new office in the United States 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 describes its business as "internet marketing and social media consultant."

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 failed to establish that it and the foreign employer share common ownership and control. While the petitioner has asserted that the beneficiary owns 51% of the petitioner, the record indicates that "Business Web Ventures" owns the foreign employer. Furthermore, the director noted unresolved dating inconsistencies in the membership certificates and the membership ledger as well as a missing membership certificate for an owner of a minority interest.

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 record establishes that the beneficiary owns and controls both the petitioner and the foreign employer due to the beneficiary's ownership and control of the foreign employer's 100% owner, Business Web Ventures Pty Ltd. Counsel also submits additional evidence in an attempt to resolve the inconsistency in the stock ledger. Specifically, counsel submits a letter from its corporate attorneys explaining that the membership certificates should have been dated 2007 instead of 1997. Counsel also submits the missing membership certificate evidencing that [REDACTED] owned a 10% interest in the petitioner at the time the petition was filed.

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 regulation at 8 C.F.R. § 214.2(l)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

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 legal entities owned and controlled by the same group of individuals." 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). The petitioner must also establish that both it and the foreign entity are or will be "doing business." 8 C.F.R. § 214.2(l)(1)(ii)(G)(2).

In this matter, the petitioner asserts that both it and the foreign employer are owned and controlled by the beneficiary. At the time the petition was filed, the petitioner asserts that the beneficiary owned 90% of the petitioner and 90% of the foreign employer by virtue of his 90% ownership interest in the 100% owner of the foreign employer, Business Web Ventures Pty Ltd.¹ In support of these assertions, the petitioner submitted organizational and registration documents from Australia pertaining to the ownership and control of both the foreign employer and Business Web Ventures Pty Ltd. These documents indicate that the beneficiary owns and controls Business Web Ventures Pty Ltd. and, because Business Web Ventures Pty Ltd. owns and controls the foreign employer, the beneficiary owns and controls this entity as well.

Furthermore, organizational documents pertaining to the petitioner, a California limited liability company, were also submitted. These documents, which include membership certificates, an operating agreement, and a certificate ledger, indicate that the beneficiary owned 90% of the petitioner at the time the petition was filed and, after the petition was filed, transferred a portion of his interest to his spouse, retaining ultimate ownership and control over the petitioner. Finally, the petitioner submitted a letter from its corporate counsel addressing the date discrepancy between the membership certificates and the membership ledger.

Upon review, the AAO agrees with counsel's assertions and the director's decision shall be withdrawn. It has been established that it is more likely than not that the beneficiary owns and controls both the foreign employer and the petitioner. The petitioner has established that the beneficiary owns and controls Business Web Ventures Pty Ltd., which, in turn, owns and controls the foreign employer. Likewise, the petitioner has established that the beneficiary owns and controls the petitioner and satisfactorily explained the date discrepancy between the membership certificate and membership ledger.

Accordingly, the petitioner has established that it and the foreign employer are owned and controlled by the beneficiary, 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 as a "new office." In this matter, given the petitioner's description of its business organization and the beneficiary's proposed relationship to this business as its majority owner, it appears more likely than not that the beneficiary will not be an "employee" of the United States operation after the first year in operation. As explained in 8 C.F.R. § 214.2(l)(3)(v)(C), the petitioner must establish that, within one year of the petition's approval, the beneficiary will be primarily "employed" as an executive or manager. 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. 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.

¹It is noted that the beneficiary's ownership interest in both the petitioner and the foreign entity apparently changed after the petition was filed. In August 2007, the beneficiary apparently transferred a portion of his interest to his spouse. He now allegedly owns a 51% interest in the petitioner. Likewise, the beneficiary apparently transferred his interest in Business Web Ventures Pty Ltd. to River Alfresco Pty Ltd. However, the petitioner submitted evidence indicating that the beneficiary owns 100% of River Alfresco Pty Ltd. Therefore, it appears that the beneficiary continues to own and control both the petitioner and the foreign employer.

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)).

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. The director may wish to request such evidence as employment agreements, rules and regulations governing the beneficiary's prospective employment, or other documents addressing the organization's "control" over, or supervision of, the beneficiary's work performance, or lack thereof; and the beneficiary's ability, or inability, to influence the organization and the United States enterprise.

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 (*see supra*) and render a new decision after reviewing this evidence.

Furthermore, the record is not persuasive in establishing that the beneficiary performed primarily managerial or executive duties abroad. In support of its petition, the petitioner submitted a vague and non-specific job description which fails to establish what the beneficiary did on a day-to-day basis abroad. 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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). 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. 593, 604 (Comm. 1988).

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 further review.