

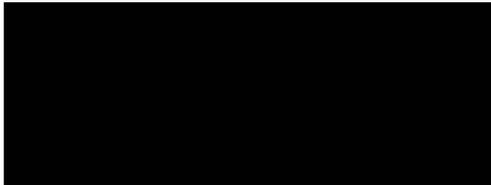
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
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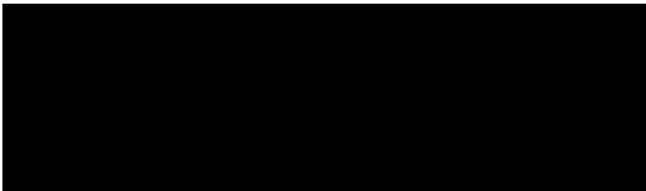
Date:

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, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as its president and chief executive officer (CEO) 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 New Jersey corporation claiming to be engaged in the business of online marketing and sales of database management solutions. The petitioner seeks to employ the beneficiary from March 1, 2008 until February 28, 2013.

The director denied the petition on the basis of three independent grounds of ineligibility. First, the director determined that the beneficiary was not employed abroad for the requisite one-year period within the three years prior to the date the Form I-129 was filed; second, the director determined that even if the beneficiary had been employed abroad during the requisite time period, the petitioner failed to establish that the beneficiary's employment abroad was in a qualifying managerial or executive capacity; and third, the director found that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's adverse conclusion and provides a supporting appellate brief and supplemental documentation to establish the petitioner's eligibility for the immigration benefit sought.

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.

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 first issue in this proceeding is whether the beneficiary had the requisite one year of employment abroad within the three years prior to February 28, 2008, the date the instant Form I-129 was filed.¹

¹ As the beneficiary's last entry into the United States was not for the purpose of continuing her employment for an affiliate, branch, or subsidiary of the foreign employer, the relevant three-year period during which the petitioner must

The record shows that the beneficiary entered the United States on September 29, 2005 as a B-2 visitor for pleasure. The record further shows that the beneficiary remained in the United States and subsequently obtained a change of status to that of an R-2 dependent of a religious worker. As the Form I-129 in the present matter was not filed until February 28, 2008 and in light of the length of the beneficiary's lawful U.S. presence, which commenced on September 29, 2005 and which cannot be termed as being brief, it is factually impossible for the beneficiary to have been employed abroad for one full year within the three years prior to February 28, 2008. Based on the facts presented herein, at most, the beneficiary could have only been employed abroad for seven months during the relevant three-year time period. Therefore, the petitioner has failed to establish that it meets the requirement specified in 8 C.F.R. § 214.2(l)(3)(iii).

The next two issues in this proceeding call for an analysis of the beneficiary's job duties. Specifically, the AAO will determine whether the beneficiary was employed abroad and whether she would be employed by the United States petitioner in a primarily managerial or executive capacity.

In support of the Form I-129, the petitioner provided a letter dated February 14, 2008 in which the beneficiary, on behalf of the petitioner, provided the following statements regarding her foreign employment and her proposed position with the U.S. entity, respectively:

[The beneficiary's] duties as [p]resident of [the] Korea [a]ffiliate have been as follows: to control all of the business and affairs of the corporation; preside at all share holders and [b]oard of [d]irectors meetings; conceive, plan and implement long-term objectives and mid-term business development projects; to set annual goals; control, supervise and direct divisional managers of the corporation in their respective job performances; hire, fire and promote managers and key employees of the corporation; sign any deeds, mortgages, bonds, policies of insurance, contracts, investment certificates, or other instruments; and perform all duties incidental to the office of the CEO of a corporation under the Corporation Law of Korea.

[The beneficiary's] primary responsibility [as president and CEO of the U.S. entity] will be: to control all of the business and affairs of [the] U.S. [a]ffiliate; preside at all share holders and [b]oard of [d]irectors meetings; control, supervise and direct the vice-[p]resident and [d]ivisional [m]anagers, and key staff of the corporation; write business plans; set annual goals and long-term objectives; direct marketing research activities; identify marketing strategy for target market territories; negotiate lease and property acquisitions; negotiate with financial institutions for funding for property acquisition and equipment leases; formulate and [sic] personnel hiring and training policies; supervise hiring, firing and promotion activities; consult with [a] CPA on tax and management issues; consult with attorneys on compliance and other legal matters; sign any deeds, mortgages, bonds, insurance policies, contracts, investment certificates, or other instruments; and perform all duties incidental to the office of the CEO and [p]resident under the [New Jersey corporate statutes].

establish the beneficiary's one year of foreign employment is the three years prior to the date the petition was filed. *See* 8 C.F.R. §§ 214.2(l)(2)(A) and (3)(iii).

On March 6, 2008, the director issued a request for additional evidence (RFE), informing the petitioner that the documentation submitted thus far was insufficient to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity.

With regard to the foreign employment, the petitioner was asked to outline the beneficiary's managerial or executive job duties and to discuss those duties in the context of the foreign entity's organization and personnel structure. With regard to the beneficiary's proposed employment with the U.S. entity, the petitioner was instructed to provide evidence of its management and personnel structure with an indication as to the number of subordinates that would be under the beneficiary's supervision, the subordinate employees' job titles and job duties, and a discussion of who will conduct the business of selling the company's product. The petitioner was also asked to provide a copy of its organizational chart.

In response, the petitioner provided a letter from counsel dated April 15, 2008 in which counsel stated that the beneficiary was charged with overseeing five divisional and sectional directors and managers within her position with the foreign entity. Counsel stressed the beneficiary's position as the organization's top-most executive, which resulted in broad discretionary authority over a broad range of corporate activities. Despite the director's request, neither counsel nor the petitioner provided a list of the beneficiary's actual foreign job duties. Rather, counsel repeated the broad list of responsibilities previously provided by the petitioner and added that the beneficiary wrote business plans; set annual and long-term goals; generated marketing brand name recognition; supervised market research and directed marketing activities; identified locations for expansion; negotiated terms for property and equipment leases, property acquisitions, and funding with regard thereto; established hiring and training policies; and assigned job duties to subordinate employees. It is noted that while certain job duties were provided, counsel's description was comprised primarily of broad job responsibilities, which failed to convey a true understanding of the beneficiary's daily tasks and, more importantly, did not explain how a variety of the broader job responsibilities were carried out.

With regard to the beneficiary's proposed position with the U.S. entity, counsel stated that the beneficiary would manage three subordinate employees—the vice president/support division manager, a marketing manager, and an office manager. Counsel added that other non-executive and non-managerial employees were omitted from the discussion. However, it is noted that the Form I-129 indicates that the petitioner employed a total of three employees at the time of filing. It is therefore unclear who, beyond the three employees that were previously identified, could have been employed by the petitioner during the critical time period. Furthermore, although the petitioner provided an organizational chart, the overwhelming majority of the positions listed in the chart are unfilled as of yet and will remain unfilled until some projected time in the future. Thus, while the petitioner attempted to illustrate the hierarchy of its corporate structure, the organizational chart submitted was effective as of April 7, 2008, which is more than one month after the Form I-129 was filed. The AAO notes that the petitioner must establish its ability to employ the beneficiary in a managerial or executive capacity as of the date of filing. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The petitioner's corporate structure as of the date the petition was filed is key to making such a determination.

Lastly, counsel stated that "virtually 100 percent of the [b]eneficiary's full[-]time work will be devoted to her

executive function at [the petitioning entity]." He reiterated that the beneficiary is the petitioner's sole shareholder and that she has complete discretion over the business development and operation. However, neither the beneficiary's placement within the petitioning entity's hierarchy nor her discretionary authority establish that she would be primarily employed in a qualifying capacity. In addition to the beneficiary's position and discretionary authority, the petitioner must provide a detailed description of the beneficiary's job duties and establish its overall ability to relieve the beneficiary from having to primarily focus on the petitioner's non-qualifying daily operational tasks. The petitioner did not succeed in establishing these key elements with the documentation submitted in response to the RFE.

Accordingly, in a decision dated April 22, 2008, the director denied the petition, finding that the petitioner failed to establish that the beneficiary was employed abroad and that she would be employed by the U.S. entity in a position that is within a qualifying managerial or executive capacity. The director cautioned the petitioner from relying heavily on the beneficiary's position with either entity's organizational hierarchy, placing more emphasis on a thorough description of the beneficiary's job duties with respect to each entity. With regard to the U.S. entity, the director observed that two key elements were missing. The director determined first, that the petitioner failed to specify which duties the beneficiary would perform and second, that the petitioner failed to explain who is actually providing its goods and/or services on a daily basis.

On appeal, counsel submits a brief itemizing the beneficiary's educational and professional background and names individuals with whom the beneficiary had dealings in her capacity as CEO of the foreign entity. Additionally, the petitioner provides statements from the beneficiary's peers, who discussed their business dealings with the beneficiary and attested to her competence in her employment abroad.

With regard to the beneficiary's proposed employment, the petitioner provides a recent organizational chart updated to show the petitioner's organizational hierarchy as of May 2008. This information was accompanied by employee paystubs from May 2008 and another job description for the beneficiary and the remainder of the petitioner's employees.

The AAO finds, however, that neither counsel's statements nor the supporting evidence is persuasive in establishing that the beneficiary was employed abroad and would be employed by the U.S. petitioner in a qualifying managerial or executive capacity.

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 AAO will then consider this information in light of a company's organizational hierarchy, the beneficiary's position therein, and the company's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks. While the petitioner has emphasized the beneficiary's prominent role in leading the foreign and U.S. entities with regard to all business matters, the petitioner has not provided comprehensive job descriptions detailing the specific duties performed abroad and the duties the beneficiary would be expected to perform in the United States at the time the Form I-129 was filed. 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).

Despite the professional opinions of the beneficiary's peers overseas, there is no indication that they are qualified to assess the beneficiary's daily job duties in light of the U.S. statutes and regulations that define the relevant terminology and specify the provisions the petitioner must meet in order to establish that the beneficiary was employed abroad in a managerial or executive capacity. It is noted that the common definition of manager or executive is different from the relevant statutory and regulatory definitions that are applicable in the matter at hand. Mere interaction with the beneficiary in the course of various business transactions does not render the beneficiary's peers qualified to weigh in and assist Citizenship and Immigration Services in determining whether the beneficiary was employed abroad in a qualifying capacity. Without proper disclosure of the beneficiary's specific daily tasks and a clear explanation of who within the foreign entity was actually providing the non-qualifying operational tasks, the petitioner cannot succeed in establishing that the beneficiary's employment abroad primarily involved the performance of qualifying managerial or executive duties. Therefore, even if the petitioner were able to establish that the beneficiary had the requisite amount of employment abroad during the relevant time period, it would nevertheless be ineligible for the benefit sought due to its failure to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

Next, although the petitioner has provided the beneficiary's proposed job description on three different occasions, the three descriptions are almost identical in their content and all three primarily consist of broad responsibilities rather than specific job duties that convey an understanding of how the beneficiary's time would be spent on a daily basis. Merely claiming that 40 hours per week would be spent on the responsibilities and duties provided in the job description is not sufficient. A number of the responsibilities listed, i.e., negotiations for lease and property acquisitions and negotiations with financial institutions, do not appear to be duties that the beneficiary would need to carry out on a daily basis. As such, the petitioner should more specifically indicate how much of the beneficiary's time would be spent performing these particular duties as opposed to other duties that may be performed on a more regular, or daily, basis. In other words, while it is understandable that some duties are performed on a more frequent basis, the petitioner could have addressed this issue by specifically listing the duties and then by indicating the portion or the percentage of time assigned to the specific duties. This would enable the AAO to gauge which duties would be performed most frequently and which would consume the greatest portion of the beneficiary's week. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Additionally, the petitioner's organizational chart and pay stubs issued by the petitioner in May 2008 do not address the more relevant matter of the petitioner's staffing composition as of the date the Form I-129 was filed. As previously indicated, 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. It is noted that in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v.*

INS, 293 F. Supp. 2d 25, 29 (D.D.C. 2003). That being said, the petitioner has indicated that at the time the Form I-129 was filed it was staffed with three employees—a technical support manager, a marketing manager, and an office manager. While the petitioner indicated that the beneficiary would be placed at the top of the hierarchy, the petitioner did not provide a thorough explanation of how, with the staffing composition it had in place at the time of filing, it would have been able to relieve the beneficiary from having to primarily perform non-qualifying job duties. 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).

In summary, the petitioner failed to adequately describe the beneficiary's proposed job duties and did not explain how its organizational structure at the time of filing required and had the capability to support a managerial or executive employee. Therefore, in light of the documentation submitted by the petitioner thus far, the AAO concludes that the petitioner has failed to establish that it was ready and able to employ the beneficiary in a qualifying managerial or executive position at the time the Form I-129 was filed.

Lastly, 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. It is noted that "employer" and "employed" are not specifically defined for purposes of the Act even though these terms are used repeatedly in the context of addressing the current employment-based nonimmigrant classification. However, 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.

Furthermore, 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)).

Within the context of immigrant petitions seeking to classify the beneficiary as a multinational manager or executive, 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*).

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that the beneficiary will be an "employee" employed in a managerial or executive capacity. The petitioner is a corporation, which is ultimately owned and controlled by the beneficiary, who purports to assume a role as the petitioner's principal. There is no evidence that any other individual has an ownership interest or is in a position to exercise any control over the work to be performed by the beneficiary.

In view of the above, it appears that the beneficiary will be a proprietor of this business and will not be an "employee" as defined above. It has not been established that the beneficiary will be "controlled" by the petitioner or that the beneficiary's employment could be terminated. To the contrary, the beneficiary *is* the petitioner for all practical purposes. She will control the organization; she cannot be fired; she will report to no one; she will set the rules governing her work; and she will share in all profits and losses. Therefore, based on the tests outlined above, the petitioner has not established that the beneficiary will be "employed" as an "employee."

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. 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.