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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 24 2006

SRC 06 030 51623

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a Florida corporation engaged in the development of diagnostic software and tools designed for use in the automotive and property management industries. It seeks to employ the beneficiary as its vice president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer and denied the petition.

On appeal, counsel disputes the director's conclusion and underlying analysis and submits a brief in support of her arguments.

Section 203(b) of the Act states in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> > (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The primary issue in this proceeding is whether the petitioner has a qualifying relationship with the beneficiary's foreign employer.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

> *Affiliate* means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One 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;

* * *

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In support of the Form I-140, the petitioner submitted a letter dated November 2, 2005, which states that the beneficiary's foreign employer is the petitioner's affiliate. Counsel supplemented the petitioner's statement with a letter dated November 4, 2005[1] in which she identified the four individuals who cumulatively own 96% of the foreign entity and the same four individuals who cumulatively own 80% of the U.S. entity. Counsel emphasized that four of the five individuals who own the petitioner also own the foreign entity.[2] Based on this common ownership, counsel asserted that the petitioner has an affiliate relationship with the foreign entity.

On November 21, 2005, the director issued a notice of intent to deny (NOID) the petitioner's Form I-140 and requested that additional documentation be submitted. The director stated that the intended ground for denial was the petitioner's lack of a qualifying relationship with the beneficiary's foreign employer.

In response, counsel submitted a letter dated December 20, 2005 discussing her reasons for disagreeing with the director's finding. Primarily, counsel discussed case law, which she claimed supported her interpretation of the definition of affiliate and cited what she perceived as the relevant section of the Act.[3]

On January 9, 2005, the director denied the petition concluding that the case law discussed by the petitioner is consistent with the regulatory definition of affiliate.

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[1] On the first page of counsel's supplemental statement, counsel stated that the petitioner filed a Form I-140 on behalf of the petitioner pursuant to § 101(a)(15)(L) of the Act. The AAO notes, however, that the portion of the Act cited by counsel defines the various categories of nonimmigrants and is therefore irrelevant in the instant matter, which involves the filing an immigrant petition. While the AAO duly notes counsel's error, it will rely on the statutory and regulatory provisions that are relevant to the type of immigration benefit sought by the petitioner in the instant matter.

[2] It is noted for the record that, although counsel claims 96% of the foreign entity is owned by four individuals, based on the evidence of record presented, it appears instead that these four individuals own 100% of the foreign entity, each owning 24 shares.

[3] Contrary to counsel's assertion, § 101(a)(15)(L) of the Act does not contain the provisions that are relevant to the filing of an immigrant petition.

On appeal, counsel cites *Sun Moon Star Advanced Power, Inc. v. Chappel*, 773 F. Supp. 1373 (N.D. Cal 1990), asserting that two companies may be affiliated even though they are not owned by the exact same individuals. In the *Sun Moon Star* decision, the Immigration and Naturalization Service (now CIS) refused to recognize the indirect ownership of the petitioner by three brothers, who held shares of the company as individuals through a holding company. The decision further noted that the two claimed affiliates were not owned by the same group of individuals. The court found that the Immigration and Naturalization Service decision was inconsistent with previous interpretations of the term "affiliate" and contrary to congressional intent because the decision did not recognize the indirect ownership. After the enactment of the Immigration Act of 1990, the Immigration and Naturalization Service amended the regulations so that the current definition of "subsidiary" recognizes indirect ownership. *See* 56 Fed. Reg. 61111, 61128 (Dec. 2, 1991). Accordingly, the basis for the court's decision has been incorporated into the regulations. However, despite the amended regulation and the decision in *Sun Moon Star*, neither legacy Immigration and Naturalization Service nor CIS has ever accepted a random combination of individual shareholders as a single entity, so that the group may claim majority ownership, unless the group members have been shown to be legally bound together as a unit within the company by voting agreements or proxies.

To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

In this case the U.S. entity is owned by five individuals, and the foreign entity is owned by four individuals. Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the same individuals own and control both entities. Thus, the companies are not affiliates as both companies are not owned and controlled by the same individuals.

Counsel also cites *Matter of Tessel, Inc.*, 17 I&N Dec. 631 (Acting Assoc. Comm. 1981) as case law precedent, which she perceives as supporting her reasoning and definition of an affiliate. However, counsel has misconstrued the decision. In the *Tessel* decision, the beneficiary solely owned 93% of the foreign corporation and 60% of the petitioning organization, thereby establishing a "high percentage of common ownership and common management . . . ." It was further determined that "[w]here there is a high percentage of ownership and common management between two companies, either directly or indirectly or through a third entity, those companies are 'affiliated' within the meaning of that term as used in section 101(a)(15)(L) of the Act." *Id.* at 633. The facts in the present matter can be distinguished from *Matter of Tessel* because no one shareholder holds a majority interest in either corporation. The record, therefore, fails to demonstrate that there is a high percentage of common ownership and common management between the two companies.

Accordingly, based on the evidence submitted, it is concluded that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations.

Furthermore, the record supports a finding of ineligibility based on additional grounds that were not previously addressed in the director's decision.

First, 8 C.F.R. § 204.5(j)(5) states that the petitioner must provide a detailed description of the beneficiary's proposed duties in order to establish that it would employ the beneficiary 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. *Id.* In the instant matter, the petitioner has stated that the beneficiary's proposed position in the United States would include overseeing software development and equipment maintenance, directing the general management of the business, and exercising discretionary authority over the petitioner's personnel and its overall business activity. However, reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What would the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *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).

Moreover, in light of the nature of the petitioner's business whose primary focus is the provision of services, the petitioner must identify who is actually providing those services. It is noted that 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). Thus, the petitioner must establish that the beneficiary himself is not providing the petitioner's services. In the instant matter, the petitioner's organizational chart does not identify any employees aside from the beneficiary who would actually provide services to the petitioner's clientele. Based on both the lack of a detailed job description and an adequate support structure, the AAO cannot conclude that the Form I-140 was filed at a time when the petitioner was able to sustain the beneficiary in a primarily managerial or executive capacity.

Second, 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." Although the petitioner has described itself as a service providing entity, there are no invoices to show that it was providing its services on a "regular, systematic, and continuous" basis in November and December of 2004, or in February, March, and May of 2005. *See id.* Therefore, the AAO cannot conclude that the petitioner was doing business in the prescribed manner during the requisite time period as specified in 8 C.F.R. § 204.5(j)(3)(i)(D).

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). Therefore, based on the three additional grounds of ineligibility, this petition cannot be approved.

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. v. United States*, 229 F. Supp. 2d at 1043, *aff'd,* 345 F.3d 683.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit

sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.