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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAY 03 2007

EAC 05 135 52253

IN RE: Petitioner:
Beneficiary: [redacted]

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: SELF-REPRESENTED

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, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was incorporated in the State of Delaware on July 11, 2003. It claims to be engaged in the business of providing a variety of web-related services and seeks to employ the beneficiary as its president and chief executive officer (CEO). 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 denied the petition based on the following independent grounds of ineligibility: 1) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer as claimed in support of the Form I-140; 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; 3) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 4) the petitioner failed to establish that the claimed foreign affiliate continues to exist and do business in the beneficiary's absence.

On appeal, the beneficiary, on behalf of the petitioner, disputes the director's findings and submits a brief along with supplemental documentation in support of his assertions.

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 first issue is whether the petitioner has provided sufficient evidence to establish that it 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 provided a letter dated April 4, 2005 in which it claimed that the foreign entity currently operates as a branch of the U.S. entity. The petitioner provided no documentation in support of this claim.

Accordingly, Citizenship and Immigration Services (CIS) issued a request for additional evidence (RFE) dated December 30, 2005 instructing the petitioner to substantiate its claimed relationship with the beneficiary's foreign employer by submitting documentary evidence. The RFE specifically instructed the petitioner to provide all issued stock certificates to show how much authorized stock was issued and to whom.

In response, the petitioner provided a letter dated February 13, 2006, claiming that the beneficiary owns 100% of the U.S. entity. In support of this claim, the petitioner submitted its Articles of Incorporation and a blank stock certificate. In a separate letter, which was also dated February 13, 2006, the petitioner stated that the beneficiary owns 80% of the foreign entity. In support of this claim, the petitioner provided an English translation of an Announcement of the Istanbul Trade Registry, which discusses the beneficiary's purchase of 80% of the foreign entity's shares. It is noted that the original foreign language document did not accompany the translation.

On March 23, 2006, the director denied the petition stating that the petitioner failed to provide sufficient documentary evidence to establish that it and the beneficiary's foreign employer shared common ownership and control. The director properly pointed out that the petitioner's failure to identify the individual responding to the RFE and making claims on the company's behalf. Each of the letters provided in response to the RFE and in support of the petition contains initials of the individual making the claims. However, the initials are barely legible and even if they were legible are insufficient to properly identify the person making the claims on behalf of the petitioner. In addition, the director specifically noted the petitioner's submission of a blank stock certificate and concluded that ownership of the U.S. entity had not been established.

On appeal, the petitioner identifies the beneficiary as the individual acting on its behalf. The beneficiary reiterates the prior claim that he is the majority owner of both entities and explains that the blank stock certificate was submitted in error. Although a completed stock certificate has been submitted in support of the appeal, the petitioner failed to provide this requested documentation in response to the RFE. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the document in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the stock certificate submitted on appeal. Consequently, the AAO concludes that the petitioner failed to properly document its claimed qualifying relationship with the beneficiary's foreign employer and, therefore, has failed to meet the requirements cited in 8 C.F.R. § 204.5(j)(3)(i)(C).

The next two issues in this proceeding require an analysis of the beneficiary's employment capacity. The first issue is whether the petitioner would employ the beneficiary in a qualifying managerial or executive capacity. The second issue is whether the beneficiary was employed abroad in a qualifying capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means 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), provides:

> The term "executive capacity" means 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.

In the petitioner's support letter, the beneficiary was described as the U.S. company's president whose responsibilities included overseeing company objectives, managing the company's corporate contacts, and acquiring and maintaining corporate customers. The petitioner further added that the beneficiary is the U.S. company's senior consultant to corporate clients. With regard to the beneficiary's position with the foreign entity, the petitioner merely stated that the beneficiary served as the company's general manager for five years. No additional information was provided with regard to the beneficiary's duties or responsibilities with the foreign entity.

Accordingly, the RFE instructed the petitioner to provide specific information regarding the staffing structure of the foreign entity including the job titles and job duties performed by the beneficiary's subordinates during his employment abroad. The petitioner was also instructed to specify the duties performed by the beneficiary on a daily basis. With regard to the beneficiary's proposed employment with the U.S. petitioner, the RFE instructed the petitioner to provide an hourly breakdown of the duties to be performed by the beneficiary on a weekly basis. The RFE specifically noted the need for an official job offer which should include the specific employment capacity the beneficiary would assume in his proposed position. Additionally, the petitioner was instructed to discuss the staffing of its organization, including the number of employees, the duties each employee would perform, and the management structure of the organization.

The petitioner responded with a letter entitled "Job Description," dated February 13, 2006. The letter inlcuded two lists—one containing the beneficiary's proposed duties and the other containing the beneficiary's responsibilities:

Duties:
To set goals for sales, number of customers and service transitions to achieve continuous growth, [sic]

To oversee company operations to achieve goals and targets set based on [a] preset timeline, [sic]

To understand changes in the market and customer needs to adopt new products and services or transform existing services to fit customer needs, [sic]

To determine and formulate policies and provide the overall direction of the company, [sic]

To plan, direct, or coordinate operational activities at the highest level of management, [sic]

To create new business frameworks that will enhance current market position by creating new customers, [sic]

Responsibilities:
To achieve growth for the company to develop its own policies with a corporate body, [sic]

To hire and recruit employees that will serve company goals and enable growth, [sic]

To reduce costs in order to allow resources be used in development and marketing, [sic]

With regard to the beneficiary's position abroad, the petitioner indicated that the company was comprised of three employees—the beneficiary as general manager, one customer support employee, and one administrative employee who also dealt with customer relations. The petitioner stated that the customer support employee would assume the beneficiary's role in the beneficiary's absence. However, the petitioner provided no specific information as to the duties performed by the beneficiary during his employment abroad.

Accordingly, the director noted the various deficiencies and overall lack of information with regard to the beneficiary's duties abroad and in the United States. The director ultimately concluded that the petitioner failed to provide sufficient evidence to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity.

The beneficiary disputes these findings on behalf of the petitioner, but focuses primarily on the proposed position with the petitioning entity. No additional information is provided to clarify the actual duties performed by the beneficiary during his employment with the foreign entity.

With regard to the proposed position with the U.S. petitioner, the beneficiary states that he developed software to be used by the petitioner's clientele. The beneficiary further states that in 2005, the year during which the Form I-140 was filed, he spent six months out of the year servicing the petitioner's existing clientele and the remaining six months developing software.

In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant matter, while the petitioner has failed to comply with the RFE request for a detailed hourly breakdown of the beneficiary's weekly job duties, the summary of the beneficiary's job description includes a large number of oversight responsibilities. However, the record does not include a description of any subordinate positions that would actually perform the essential functions the beneficiary would be overseeing. Moreover, the beneficiary clearly states on appeal that a majority of his time is split between working directly with the petitioner's clientele in providing consulting services and actually developing the product to be marketed by the petitioner. Thus, by the beneficiary's own admission, a majority of his time would be spent providing the services and products marketed and sold by the petitioner. However, 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). Accordingly, based on the evidence and information provided, the AAO cannot conclude that the beneficiary was employed abroad and would be employed by the U.S. petitioner in a qualifying managerial or executive capacity.

The final issue discussed by the director is whether the petitioner has provided sufficient evidence to establish that the foreign entity continues to do business in the beneficiary's absence.

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."

In the instant matter, the beneficiary claims that the foreign company continues to do business in his absence and further claims that the company operates with a shareholder and one other employee. However, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). As the petitioner has failed to provide evidence to corroborate the beneficiary's claim, the AAO cannot conclude that the foreign entity continues to do business. Thus, even if the petitioner were able to provide sufficient evidence to establish common ownership and control over itself and the foreign entity at the time the Form I-140 was filed, the fact that the petitioner has failed to establish the ongoing business of the foreign company undermines the overall claim that it is a multinational entity. *See* 8 C.F.R. § 204.5(j)(2) for the definition of *multinational*.

Additionally, the record indicates that the petitioner is ineligible for the benefit sought on at least one additional ground that was not specifically discussed in the director's decision. More specifically, 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. In the present matter, the Form I-140 was filed on April 11, 2005. However, the only documentation to suggest that the petitioner is doing business consist of invoices dated July 2005 and March 2006, both of which indicate that services were rendered after the Form I-140 was filed. Although the petitioner has submitted its corporate tax return for 2005, this document is not an accurate indicator of on-going and continuous business transactions. *See id.* Thus, the petitioner failed to submit sufficient documentation to establish that it had been doing business for one year prior to filing its Form I-140.

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 additional ground of ineligibility discussed above, 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.