U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] OFFICE: TEXAS SERVICE CENTER Date: MAR 30 2009
SRC 08 151 51761

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John P. Grissom
Acting 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 that claims to be engaged in the import, export, and wholesale of electronics. The petitioner seeks to employ the beneficiary as its manager. 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 determination that the petitioner failed to provide evidence establishing that it has satisfied the criteria cited in 8 C.F.R. §§ 204.5(j)(3)(i)(B) and (C), which require that the petitioner establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity during a specified time period and that it has a qualifying relationship with the beneficiary's foreign employer, respectively.

On appeal, the petitioner disputes the director's conclusions, asserting that the director abused his discretion in denying the petition and violated the beneficiary's right to due process.

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 regulation at 8 C.F.R. § 204.5(j)(3)(i) requires that the following initial evidence be submitted in support of the Form I-140:

> (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
>
> (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
>
> (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
>
> (D) The prospective United States employer has been doing business for at least one year.

The director determined that the petitioner failed to meet the requirements discussed at 8 C.F.R. §§ 204.5(j)(3)(i)(B) and (C), as described above.

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.

Additionally, 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 two letters—one dated April 2, 2008 and the other undated—both of which were signed by the company's president. The dated letter was subdivided into five categories, including a discussion of the petitioner's status as a qualifying entity, the beneficiary's qualifications, the beneficiary's level of authority, the proposed position with the

U.S. entity, and the nature and size of the petitioning entity. It is noted that neither letter specifically addressed the beneficiary's employment abroad, other than to state that the beneficiary was employed in Brazil in a similar industry. The petitioner also failed to provide the name of the beneficiary's employer(s) abroad or to discuss the beneficiary's position title or job duties during such employment. Although the undated letter briefly indicated that the petitioner has experience "at a national and international levels [sic]," the petitioner did not claim to have a qualifying relationship with any foreign entity.

Accordingly, in a decision dated December 8, 2008, the director denied the petition, finding that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity and that it has a qualifying relationship with the beneficiary's foreign employer. The director observed that the statements made in the above support letters indicated that the petitioner was unaware of the requirements specified in 8 C.F.R. §§ 204.5(j)(3)(i)(B) and (C).

On appeal, the petitioner asserts that the director's failure to issue either a request for additional evidence (RFE) or a notice of intent to deny (NOID) establishes that the director acted arbitrarily or capriciously and generally abused his discretion. However, 8 C.F.R. § 103.2(b)(8)(ii) states the following:

> If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, [U.S. Citizenship and Immigration Services] USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

In light of the above provisions, the director has the discretionary authority to determine whether the issuance of an RFE or a NOID is necessary. In the present matter, the directly clearly felt that a denial was warranted and determined that no further evidence was necessary. Contrary to the petitioner's contention, the director's authority to deny the petition without first issuing an RFE or a NOID is expressly provided for in the regulations and does not amount to an abuse of discretion.

Additionally, although the petitioner argues that the beneficiary's rights to procedural due process were violated, the petitioner has not shown that any violation of the regulations resulted in "substantial prejudice" either to the beneficiary or to the petitioner. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). Contrary to the assertions made, the petitioner has fallen far short of meeting this standard. A review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the petitioner's case. The petitioner's primary complaint is that the director denied the petition without first issuing an RFE or a NOID. As previously discussed, there is no mandate requiring the director to issue either notice prior to a denial. The record clearly supports the director's determination that the petitioner has not met its burden of proof and the denial was the proper result under the regulation. Accordingly, the petitioner's claim is without merit.

As noted above, the petitioner has not adequately addressed the beneficiary's employment abroad, failing to identify the beneficiary's foreign employer, the dates of the beneficiary's employment

abroad, or the job duties performed during such employment. Without this relevant information and documentary evidence establishing that the beneficiary was employed abroad during the requisite time period in a qualifying managerial or executive capacity, the AAO cannot conclude that the petitioner has met the criteria specified in 8 C.F.R. § 204.5(j)(3)(i)(B).

Additionally, although the petitioner has submitted its corporate tax returns for 2004 and 2005 in which Schedule K indicates that the petitioner is 100% Brazilian-owned, the petitioner provided no supplemental documentation specifically identifying its owner. Furthermore, aside from vaguely implying that it has an international presence, the petitioner has neither claimed nor provided evidence to establish that it shares common ownership and control with the beneficiary's foreign employer. *See Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). Therefore, the AAO cannot conclude that the petitioner has met the criteria specified in 8 C.F.R. § 204.5(j)(3)(i)(C).

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

First, 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 claims that it has been doing business for at least one year prior to filing the instant Form I-140, 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)). In the present matter, the petitioner claims to be in the business of acquiring and distributing electronics, thus indicating that purchase and sales transactions are at the heart of its business operations. While the petitioner has provided its bank account statements as well as the tax returns discussed above, these documents do not show the frequency of the petitioner's business transactions and therefore are insufficient for the purpose of establishing that the petitioner has been engaged in the "regular, systematic, and continuous" course of business during the requisite time period. *See id.*

Second, 8 C.F.R. § 204.5(j)(5) requires that the petitioner submit a letter of employment describing in detail the job duties to be performed during the course of the beneficiary's employment in the United States. In the present matter, the petitioner indicated that it currently has two employees and stated that the beneficiary would manage a retail store, which would include formulating pricing policies, coordinating sales promotions, placing product orders, and hiring and firing employees. 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). Neither the description of the beneficiary's proposed employment nor the petitioner's personnel composition at the time of filing indicates that the petitioner was capable of employing the beneficiary in a primarily managerial or executive capacity.

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 grounds 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.