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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: [redacted] OFFICE: NEBRASKA SERVICE CENTER Date:

DEC 27 2013

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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a California corporation that seeks to employ the beneficiary as its chief executive officer. 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 does not have a qualifying relationship with the beneficiary's foreign employer and is therefore ineligible for the immigration benefit sought in the present matter.

On appeal, counsel disputes the director's conclusion, asserting that an affiliate relationship exists between the petitioner and the beneficiary's foreign employer. The beneficiary's assertions will be fully addressed in the discussion below.

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 established a qualifying relationship with the foreign entity that previously employed the beneficiary.

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 beneficiary, on behalf of the petitioner, provided a letter dated February 7, 2008 in which he stated that he and [redacted] together own 56% of the foreign entity, each owning 28%, and that the same two individuals own the petitioning entity, each owning 50%.

On February 5, 2009, the director issued a request for evidence (RFE) in which he informed the petitioner that U.S. Citizenship and Immigration Services (USCIS) had previously erred in finding that the petitioner had established a qualifying relationship with the beneficiary's foreign employer. Accordingly, the director instructed the petitioner to submit evidence of the foreign entity's ownership and control at the time the Form I-140 was filed.

In response, counsel submitted a letter dated April 24, 2009 in which he reiterated the information provided by the beneficiary in his initial support letter. Counsel asserted that together, the beneficiary and [redacted] own a controlling interest in the foreign entity and that the same two individuals solely own and control the petitioning entity. Counsel contended that on the basis of this ownership breakdown, it can be concluded that the U.S. and foreign entities are commonly owned and controlled.

Additionally, the petitioner provided documents, which disclosed that the foreign entity has a total of six owners with [redacted] owning 38%, the beneficiary and [redacted] each owning 28%, and [redacted] each owning 2%. The petitioner also provided undated stock certificate numbers one and two, which show that out of a total 5,000 authorized shares, the petitioner issued 1,000 shares each to the beneficiary and [redacted] respectively.

In a decision dated June 1, 2009, the director reviewed the information provided in response to the RFE and determined that none of the foreign entity's six partners has an ownership interest of 50% or greater in the foreign entity while the U.S. entity is jointly and equally owned by two of the foreign entity's owners. The director determined that the ownership breakdown of the U.S. and foreign entities does not fit the definition of subsidiary or affiliate under 8 C.F.R. § 204.5(j)(2) and concluded that the petitioner does not meet the criteria specified at 8 C.F.R. § 204.5(j)(3)(i)(C), which requires the petitioner to provide evidence establishing that it has a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel challenges the director's conclusion, contending that while subsection C of the definition of affiliate discusses special provisions that apply to U.S. and foreign accounting firms, the definition of affiliate does not specifically address a scenario where the two key entities include a partnership and a corporation. While counsel properly observes that the definition of affiliate does not include special provisions for relationships between partnerships and corporations, this omission merely indicates that special regulatory provisions were deemed unnecessary and that the provisions of subsections A and B of the definition of affiliate are sufficient to determine when an affiliate relationship exists between a partnership and a corporation. Subsection A of the definition of affiliate requires that the foreign and U.S. entities be owned by the same parent or individual. As the fact pattern presented herein does not fit this portion of the definition, we turn to subsection B, which applies to any two legal entities that are owned by the same group of individuals, each of whom owns and controls approximately the same proportion of each entity.

In the present matter, the two entities involved are a U.S. corporation and a foreign partnership, both of which are legal entities. As such, there is no question that the provisions of subsection B are applicable and would determine whether the requisite qualifying relationship exists between the beneficiary's U.S. and foreign employers. In applying the said provisions, there is no question that the two entities are not similarly owned and controlled. As discussed above pursuant to a review of the supporting documents, the foreign entity is owned by six different individuals, none of whom has majority ownership and in effect controls the entity. While it is true that the beneficiary and [redacted] together could combine their ownership interests to control the foreign entity, the same may be said of the beneficiary and [redacted] and [redacted] In other words, where no one person has a controlling interest, there is always the possibility that either the beneficiary or [redacted] will be out-voted if either chooses to combine his vote with that of [redacted] whose ownership interest in the foreign entity exceeds that of the beneficiary or that of [redacted] 10%.

Although counsel claims that the petitioning company and the overseas company are majority owned by members of the same family, this familial relationship does not constitute a qualifying relationship under the regulations. The AAO further notes that USCIS 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. However, the petitioner does not claim or provide evidence to establish that any voting agreements or proxies have been executed by members of the foreign entity that would give control of the entity to the beneficiary and/or [redacted]

In summary, the record clearly indicates that the petitioning enterprise does not maintain a qualifying "affiliate" relationship with the overseas company. The evidence indicates that six individuals own the foreign company, while only two individuals own the petitioning entity in the United States. Accordingly, the two entities are not "owned and controlled by the *same group of individuals*, each individual owning controlling approximately the same share or proportion of each entity . . . ." 8 C.F.R. § 204.5(j)(2)(emphasis added). As discussed above, there is also no parent entity with ownership and control of both companies that would qualify the two as affiliates under subsection A of the definition of affiliate. Therefore, the petitioner has failed to establish that it has a qualifying relationship with the beneficiary's foreign employer and on the basis of this conclusion, the petition may not be approved.

Additionally, while not addressed in the director's decision, the AAO finds that the record lacks sufficient

evidence to establish that the beneficiary was either employed abroad or that he would be employed in the United States within a qualifying managerial or executive capacity pursuant to the filing requirements specified at 8 C.F.R. §§ 204.5(j)(3)(i)(B) and (5), respectively. In examining the executive or managerial capacity of the beneficiary, a description of the beneficiary's job duties is essential, as the actual duties themselves 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). In the present matter, the petitioner has not provided detailed information explaining what specific job duties the beneficiary performed during his employment abroad and what specific job duties he would perform in his proposed position with the U.S. petitioner. Without this information, the AAO cannot conclude that the beneficiary was employed abroad and would be employed in the United States in a 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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional grounds of ineligibility discussed in the paragraph above, this petition cannot be approved.

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.