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 0 6 2010
SRC 08 148 52619

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:

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
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 limited liability company organized in the State of Texas. It seeks to employ the beneficiary as its senior 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 two independent grounds of ineligibility: 1) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; and 2) the petitioner failed to establish that it has a qualifying relationship with the foreign entity that employed the beneficiary abroad.

On appeal, counsel disputes both grounds of the denial as well as the service center's denial of the beneficiary's underlying Application to Register Permanent Residence or Adjust Status (Form I-485). With regard to the latter issue, the AAO has no jurisdiction to consider an appeal from the denial of an I-485. *See* 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). Therefore, the AAO will limit the subject matter of this decision to the denial of the petitioner's immigrant visa petition. It is noted that counsel indicates in the Form I-290B, Notice of Appeal or Motion, that he plans to submit an appellate brief within 30 days of submitting the appeal, which was received by U.S. Citizenship and Immigration Services on January 13, 2009. To date, however, no further evidence or information has been received into the record. As such, the record will be considered complete as currently constituted and the AAO will issue its decision based on the documentation that is currently on file.

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 in this proceeding is whether the petitioner submitted sufficient evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive 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 support of the Form I-140, the petitioner submitted a letter dated March 24, 2008, which includes a description of the beneficiary's proposed employment. As the director included the description in his latest decision, the AAO need not repeat that information. Other relevant supporting documentation included a copy of the petitioner's organizational chart, the petitioner's 2007 employer's quarterly reports[1] as well as the IRS Form W-2s the petitioner purportedly issued to its employees in 2007.

After reviewing the petitioner's submissions, the director found the petitioner ineligible for the immigration benefit and therefore issued a decision dated December 11, 2008 denying the instant petition. The director pointed out that the petitioner's prior Form I-140 had also been denied and the appeal from that denial was based on similar issues as those that served as the bases for the director's current denial. The director expressly noted that the petitioner had submitted a similar description of the beneficiary's proposed employment in support of the prior Form I-140 and further pointed out that the decisions issued by the service center and the AAO notified the petitioner that the job description was vague and that it lacked the necessary degree of detail.

The director also reviewed documentation submitted in support of the prior Form I-140 with regard to the petitioner's support staff and compared that evidence with the evidence submitted in support of the current petition. While the director made note of certain changes in the petitioner's staffing composition, he came to the same overall conclusion as the one reached in the prior decision—that the petitioner did not have an adequate support staff at the time the Form I-140 was filed, thereby making it unlikely that the petitioner was ready to employ the beneficiary in a primarily managerial or executive capacity.

On appeal, counsel puts forth a number of arguments. First, counsel asserts that the director erred by failing to review the new petition and supporting documentation *de novo*. A thorough review of the director's decision, however, indicates that counsel's assertion is without merit. Although the director made numerous references to the previously filed Form I-140 and its supporting documentation, the most recent denial gives every indication that a comprehensive review of the current record was conducted with regard to the petitioner's current filing. It appears that the director was merely pointing out that the petitioner was previously informed of the deficiencies that served as the bases for the most recent denial by virtue of having had similar deficiencies as the focus of the director's and the AAO's respective decisions with regard to the previously filed Form I-140. The fact that the director repeated the beneficiary's job description and referenced tax documents, all of which were submitted in support of the current petition, is sufficient to indicate the petitioner's most recent submissions, not documents that were submitted in support of an earlier petition, served as the ultimate basis for the decision that is currently being appealed.

Second, counsel contends that the director erred in failing to issue a request for additional evidence (RFE), which would have informed and allowed time for the petitioner to rectify any deficiencies. Again, counsel's assertion is without merit, as there is no regulatory provision that mandates the issuance of an RFE under any circumstances. Rather, 8 C.F.R. §103.2(b)(8) allows the director to use his discretion in determining when to issue an RFE. In the present matter, the director determined that a denial was warranted and that an RFE did not need to be issued. While the petitioner can challenge the director's decision by filing an appeal and overcoming the bases for denial, the director's use of discretion in not issuing an RFE will not be reviewed.

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[1] It is noted that the petitioner submitted three of the four employer's quarterly reports for 2007. The employer's quarterly report for the second quarter of 2007 was not submitted.

Counsel also asserts that the director failed to apply the preponderance of the evidence standard and violated Title 5 of the Administrative Procedure Act. However, counsel provided no real argument explaining which of the director's findings is indicative of the claimed violations. While counsel submits other statements expressing his general disagreement with the director's findings, he does not specify any legal or factual error that indicates that the director failed to apply the proper evidentiary burden or violated the Administrative Procedure Act.

In examining the executive or managerial capacity of the beneficiary, USCIS 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, the director properly noted that the description of the beneficiary's job duties is too general to convey a meaningful understanding of exactly what the beneficiary will be doing on a daily basis and how much of his time would be devoted to qualifying tasks. The petitioner provided no specific discussion as to the types of policies the beneficiary would formulate, the specific tasks that would constitute "managing the daily operations," or what actual tasks would be involved in allocating materials and human resources. Similarly, the petitioner did not explain the tasks the beneficiary would undertake in coordinating department activities or how the beneficiary plans to implement departmental policies, goals, and objectives. These statements seemingly paraphrase the statutory definition of managerial capacity, but fail to specify actual daily tasks, which are the true indicators as to the 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). Despite the advantage that the petitioner had in having earlier decisions that specified the deficiencies of the job description that was submitted in support of an earlier Form I-140, the petitioner chose not to take the opportunity to supplement the record with a more detailed job description. The AAO cannot overlook the fact that the petitioner resubmitted a job description, completely disregarding the fact that the AAO had previously found that very description to be lacking key information about the beneficiary's specific daily job duties. As the petitioner has failed to comply with 8 C.F.R. § 204.5(j)(5), which instructs the petitioner to provide a detailed description of the job duties the beneficiary would perform in his proposed employment, the AAO cannot conclude that the beneficiary would be employed by the U.S. petitioner in a qualifying managerial or executive capacity.

The other issue in this proceeding is whether the petitioner has a qualifying relationship with a foreign entity.

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 the support letter dated March 24, 2008, the petitioner claimed that it and the beneficiary's foreign employer have an affiliate relationship on the basis of their shared ownership and control by the same group of individuals. The supporting documents that were submitted to corroborate the petitioner's claim include the petitioner's Certificate of Filing and Certificate of Formation. While Article V of the Certificate of Formation states that the beneficiary and his wife are both managers of the petitioning entity, this fact only establishes the company's management. There is no documentation establishing that the petitioner's managers are also its owners.

The petitioner also submitted a document entitled "Certificate of Common Ownership," signed by the beneficiary and notarized on June 29, 2006, which consists of a statement from the beneficiary, who claims that he and his wife together are majority owners of the foreign entity and that they together control 72% of the entity. However, the beneficiary's statement is little more than a reiteration of the claim made in the initial support letter. The notary stamp on the beneficiary's statement merely establishes that the beneficiary's identity was verified before the notarizing official; the stamp does not indicate that the representations made by the beneficiary are factually correct. It is noted that 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)).

Although the director did not make an adverse finding with regard to the lack of supporting evidence of the foreign entity's ownership, he nevertheless determined that the submitted documentation does not establish the existence of a qualifying relationship between the petitioner and the beneficiary's foreign employer. Specifically, the director found that the shared ownership of the foreign entity entitled the beneficiary and his wife each to a 36% interest in the company, thus creating no majority interest in either party. With regard to the U.S. entity's ownership, the director determined that sufficient evidence was lacking and that if, in fact, USCIS were to consider the outdated partnership tax return that had been submitted, this would not establish that the U.S. and foreign entities were commonly owned and controlled, as the petitioner's claim is premised on the erroneous belief that the family relationship between the beneficiary and his wife is sufficient to establish that their joint ownership of both entities constitutes a majority ownership in each separate entity. The petitioner's assumption is incorrect.

The record clearly indicates that the petitioning enterprise does not maintain a qualifying "affiliate" relationship with the overseas company. Even if the petitioner's claims were supported by documentary evidence, such claims indicate that three 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. § 214.2(l)(1)(ii)(L)(2)(emphasis added). In addition, there is no parent entity with ownership and control of both companies that would qualify the two as affiliates. As stated above, the claim that the petitioning company and the overseas company are majority owned by the husband and wife due to the spousal relationship is incorrect, as such an ownership breakdown does not constitute a qualifying relationship under the regulations. For this additional reason, the petition may not be approved.

Furthermore, while not previously addressed in the director's decision, the AAO finds that the petitioner failed to meet the provisions of 8 C.F.R. § 204.5(j)(3)(i)(B), which require the petitioner to establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to his entry to the United States as a nonimmigrant to work for the same employer. In the present matter, other than stating that the beneficiary was employed at the foreign entity for 20 years in a qualifying managerial capacity, the petitioner provided no other information about the beneficiary's job duties or the job titles and job duties of his subordinates. Without this critical information, the AAO cannot determine what tasks the beneficiary performed on a daily basis or whether the foreign entity was adequately staffed to relieve the beneficiary from having to primarily perform non-qualifying tasks.

Lastly, the AAO notes a factual discrepancy that gives rise to doubt as to the reliability of certain tax documentation submitted in support of the petition. Specifically, the record contains both the beneficiary's IRS Form W-2 for 2007 as well as three out of four quarterly employer's reports for 2007. It is noted that, while the Form W-2 indicates that the beneficiary was compensated a total amount of $23,333.38 in 2007, the total of the quarterly wages in the three 2007 wage reports indicate that the beneficiary was compensated at least $30,452.10 for those three quarters. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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.

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.