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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B4

[redacted]

DATE: FEB 2 2 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

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

The petitioner is a New York corporation that seeks to employ the beneficiary as its general 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.

In support of the Form I-140, the petitioner submitted a statement dated December 2, 2008, which included a summary of the ownership breakdown of the petitioning entity. The petitioner indicated that it is a wholly owned subsidiary of [redacted], a Delaware entity with four stockholders. The petitioner also provided evidence in the form of U.S. stock certificates as well as a partial English translation of the articles of incorporation of SARL Pain et Fruit, the beneficiary's foreign employer, which identified four stockholders. The supporting documents indicate that three of the four owners are common to both LLDG5, Inc. and SARL Pain et Fruit.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a notice of intent to deny (NOID) dated December 2, 2009 in which he summarized the ownership breakdowns of the U.S. and foreign entities and informed the petitioner of various relevant legal definitions. After considering the ownership breakdowns of both entities in light of the regulatory provisions, the director determined that the petitioner does not have a qualifying relationship with the beneficiary's foreign employer.

The petitioner provided a response, which included a statement from counsel, dated December 31, 2009, and a U.S. Citizenship and Immigration Services (USCIS) memorandum. In her statement, counsel maintained the assertion that since the majority of the shares in both the petitioning and foreign entities are owned by the same two individuals, this commonality is sufficient to qualify the two entities as affiliates under the regulatory definition. *See* 8 C.F.R. § 204.5(j)(2). Counsel further contended that the shareholders of each business do not have to be identical in order for the two entities to be deemed affiliates.

After reviewing the record, the director concluded that counsel's assertions were not persuasive and that the evidence of record failed to establish that the petitioner and the foreign entity had either a parent-subsidiary or an affiliate relationship.

On appeal, counsel submits a brief in which she disputes the denial on the basis of the same assertions that were made in response to the NOID. Counsel relies entirely on the fact that, when the shares of [redacted] and [redacted] are combined, these two individuals, together, hold the majority of the petitioner's and the foreign entity's stock. On the basis of this interpretation, counsel contends that the majority ownership of both entities belongs to the same two shareholders, thus indicating that the two entities are affiliates.

The AAO finds that counsel's assertions are not persuasive and fail to overcome the director's denial. The petitioner's submissions have been reviewed and all relevant documentation that pertains directly to the key issue in this matter 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 that was addressed in the director's decision is whether the petitioner has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

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.

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are either the same employer (i.e. a U.S. entity with a foreign office) or that the two entities are related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

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). The AAO notes that neither legacy Immigration and Naturalization Service nor USCIS has ever accepted a 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.

In the present matter, the facts pertaining to the ownership breakdown of each entity are not in dispute. Specifically, the record shows that the U.S. entity is a wholly owned subsidiary of [redacted]., a Delaware corporation, whose ownership is divided among four individuals as follows: 45.5% issued to [redacted], 30% issued to [redacted], 15% issued to the beneficiary, and 9.45% issued to [redacted]. [redacted] is addressed in its articles of incorporation, which shows that 10%, or 40 shares of the foreign entity's stock, was issued to [redacted] and the remaining 260 shares were evenly distributed among three individuals giving [redacted], [redacted] and [redacted], each, 30%, or 120 shares, of the foreign entity.

In light of the regulations and precedent case law holding discussed above, the petitioner and the foreign entity do not fit either of the definitions of affiliate. Despite counsel's attempt to bind [redacted] as one unit with a majority ownership in each entity, no evidence has been submitted in the form of voting agreements or proxies to support counsel's interpretation of the facts.

Moreover, the agreement of two individuals to vote shares in concert does not rise to the level of a proxy agreement that would give one individual control over the voting rights of a majority of the issued shares. Thus, the familial relationship between [redacted] is irrelevant in this matter and does not establish majority ownership by any one party.

Lastly, the AAO cannot conclude that the petitioner meets subsection (B) of the definition for *affiliate*, as the two entities are not "owned and controlled by the *same group of individuals*, each individual owning and controlling approximately the same share or proportion of each entity . . . ." Although the number of owners is the same for both entities and while it is clear that [redacted], [redacted], and [redacted] all have ownership interests in both entities, the beneficiary, who has an ownership in the U.S. entity, does not own stock in the foreign entity, and [redacted], who has an ownership interest in the foreign entity, does not have an ownership interest in the U.S. petitioner.

The evidence presented shows that the petitioner does not have a qualifying relationship with the beneficiary's foreign employer. On the basis of this conclusion, this petition cannot be approved.

Additionally, while not previously addressed in the director's decision, the AAO finds that the record lacks sufficient evidence to establish that the beneficiary was employed abroad and that he would be employed in the United States 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. *See* 8 C.F.R. § 204.5(j)(5). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In the present matter, the AAO finds that the petitioner provided overly broad statements to describe the beneficiary's employment with the foreign entity and the U.S. petitioner. As such, the AAO cannot make an affirmative conclusion as to the employment capacity of the beneficiary's foreign or proposed employment.

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 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.