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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
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FILE [REDACTED] OFFICE: TEXAS SERVICE CENTER
SRC 08 056 52264

Date: FEB 16 2010

IN RE: Petitioner: [REDACTED]
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:



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 that was organized in the State of Florida. The petitioner seeks to employ the beneficiary as its president. 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 concluded that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer and denied the petition on that basis.

On appeal, counsel disputes the director's conclusions, arguing that the U.S. and foreign entities are commonly owned by virtue of having the same two individuals as two thirds owners of both entities.

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 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 submitted a letter dated October 9, 2007, which listed the owners of the U.S. and foreign entities and each owner's respective ownership interest. The petitioner claimed that each entity is owned by three individuals with each individual owning one third of the entity. The petitioner provided its operating agreement, which states that the foreign entity is comprised of three members, each member having a one third ownership interest in the entity. The document shows that the petitioner's owners include the beneficiary, [REDACTED], and [REDACTED]. The petitioner claimed that the foreign entity's owners include the beneficiary, [REDACTED], and [REDACTED]. Thus, while both entities are partly owned by the beneficiary and [REDACTED], the remaining one third ownership interest is different in each entity.

On April 1, 2008, the director issued a request for evidence (RFE) instructing the petitioner to submit evidence of a qualifying corporate relationship between the U.S. petitioner and the beneficiary's foreign employer. The director acknowledged the petitioner's submission of documentation establishing ownership of the U.S. entity, but determined that the record lacks evidence of the foreign entity's ownership.

In response, the petitioner provided a letter dated April 29, 2008 in which counsel reiterated the ownership scheme of the U.S. and foreign entities. Counsel also stated that the foreign entity's tax returns, which the petitioner provided as part of the response to the RFE, support the petitioner's claim with regard to the foreign entity's ownership. A review of the foreign entity's partnership tax returns for 2003, 2004, 2006, and 2007 indicates that the petitioner's breakdown of ownership was accurate.

On August 22, 2008, the director issued a decision denying the petition on the basis of the petitioner's failure to establish that it has a qualifying relationship with the beneficiary's foreign employer. The director reviewed the ownership schemes contained in the petitioner's supporting documents and determined that, despite the fact that the U.S. and foreign entities share a degree of common ownership, they cannot be deemed affiliates, as they are not owned and controlled by the same group of individuals or by a common parent entity, nor do they have a parent-subsidary relationship. *See* 8 C.F.R. § 204.5(j)(2).

On appeal, counsel focuses on the two owners that are common in the ownership schemes of the foreign and U.S. entities. Counsel contends that the degree of common ownership between the petitioner and the

beneficiary's foreign employer is sufficient to establish common ownership and control, the two elements that are required to establish the existence of a qualifying relationship. *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). Counsel's argument, however, is not persuasive, as it is entirely premised on the belief that a group of individuals—in the present matter, the beneficiary and [REDACTED]—may claim majority ownership without any evidence that the group members have been legally bound together as a unit within the company by voting agreements or proxies.

To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. 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. Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the same legal entity or individuals control both entities. Thus, the companies are not affiliates as both companies are not owned and controlled by the same group of individuals. Based on the evidence submitted, it is concluded that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations.

Additionally, while not previously addressed in the director's decision, the record does not contain sufficient evidence to establish that the petitioner has met the provisions of 8 C.F.R. § 204.5(j)(3)(i)(D), which 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 has provided tax documentation and utility bills regarding its U.S. operation, neither document establishes that the petitioner has been doing business on a "regular, systematic, and continuous" basis since December 5, 2006, or one year prior to the filing the petition. *See id.*

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.

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.