



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF R-I- INC.

DATE: OCT. 27, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an importer and exporter of reptile handling tools, martial arts products, and manicure and beauty supplies, seeks to employ the Beneficiary as its president under the immigrant classification of a multinational executive or manager. *See* Immigration and Nationality Act (the Act) § 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). The Director, Texas Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. LAW

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 the alien 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 only to 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 Form I-140, Immigrant Petition for Alien Worker, to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager. The regulation at 8 C.F.R. § 204.5(j)(5) states:

No labor certification is required for this classification; however, 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 letter must clearly describe the duties to be performed by the alien.

II. ISSUE ON APPEAL

The sole issue on appeal is whether the Petitioner has established that it intends to employ the Beneficiary in the United States in a qualifying managerial or executive capacity.

Section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44), provides:

(A) 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.

(B) 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;

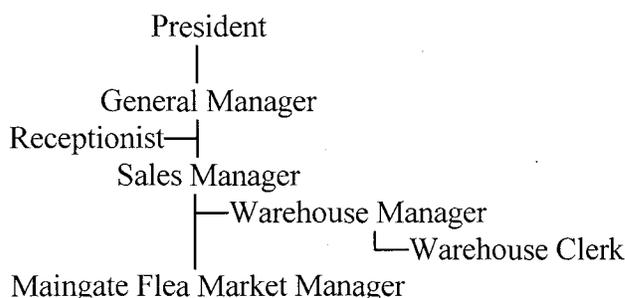
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

A. Facts

The Petitioner filed Form I-140 on May 20, 2013. On the petition form, the Petitioner indicated that it had eight employees. A May 17, 2013, cover letter submitted with the petition indicated: "The company has seven (7) employees, who are managed and directed by the beneficiary." The letter did not specify whether the Beneficiary's intended role in the United States would be managerial or executive.

Copies of IRS Forms 941, Employer's Quarterly Federal Tax Returns, indicated that the Petitioner had eight employees in the fourth quarter of 2012 and seven in the first quarter of 2013. An organizational chart submitted with the petition showed the following seven-employee structure:



The Petitioner also submitted an unsigned statement including job descriptions for each of the listed employees, starting with the Beneficiary's duties as president:

His primary function is to plan, organize, direct and control the organization's major functions through the business's employees. He confers with the upper level managers to plan business objectives, to develop organizational policies, to coordinate functions and operations between the employees, and to establish responsibilities and procedures for attaining objectives. He reviews activity reports and financial statements to determine progress and status in attaining objectives and he revises objectives and plans in accordance with current conditions. He directs and coordinates formulation of financial and sales programs to provide new sources of income, to maximize returns on

(b)(6)

Matter of R-I- Inc.

investments, and to increase sales. He works with suppliers and distributors to obtain the best prices for the products that the business sells. In addition, he holds regular staff meetings to insure that the above goals are realized, and to evaluate staff performance. In that regard, he is ultimately responsible for the hiring and firing of all employees of the business.

Four of the Petitioner's remaining six employees have managerial titles, with key duties excerpted below:

General Manager: . . . is responsible for the administration of the office and the daily functioning of the business. He looks after the needs of the office including the procurement of office equipment and supplies; billing and collection of monies due; assisting in the import . . . and export of products from the United States; assisting in the recruitment and hiring of personnel; and to make sure that the office functions in an orderly manner.

Sales Manager: . . is in charge of the sales department and is directly responsible for overseeing the sales of the business . . . [and] handling the company's largest accounts. . . . [She] is responsible for the sale of our products and services. . . . She submits price quotations and offers solutions in the line of building products and designs, and is responsible for consummating the final sales.

Warehouse Manager: . . . is responsible for the management of the daily operations of our warehouse location. She keeps a detailed inventory of [our] products . . . [and] directly communicates with the General Manager regarding the products.

Manager: . . . is responsible for the management of the daily operations of our store located at the [redacted]. He handles customer inquiries and complaints and she [*sic*] is responsible for store displays, pricing issues, and determining inventory requirements.

The Director issued a request for evidence (RFE) on September 4, 2013, instructing the Petitioner to submit "a definitive statement from the petitioner which describes the beneficiary's job duties," breaking down the amount of time the Beneficiary spends on each of those duties. The Director stated that this description must show that the Beneficiary "qualif[ies] as a multinational executive."

In response, a November 22, 2013 letter from the Petitioner's general manager, [redacted] added percentage figures to the job description submitted previously; for example: "He reviews activity reports and financial statements to determine progress and status in attaining objectives and he revises objectives and plans in accordance with current conditions (20%)." [redacted] stated that the Beneficiary devotes 95% of his time to the listed functions, and the remaining 5% on other executive duties.

(b)(6)

Matter of R-I- Inc.

added that the Beneficiary “is the highest ranking member of the organization” with “almost total discretionary authority over the day to day operations of the business, including the authority to hire, fire, or promote our employees. This authority is subject only to the decisions of the partners of the parent business in Pakistan.”

A new organizational chart matched the first chart, with the addition of a part-time sales position at . The position was marked as “available.” Additional quarterly tax returns show that the Petitioner continued to have seven employees in the second and third quarters of 2013, and the employee names listed on state returns have not changed. This information suggests that the eighth position has been vacant throughout 2013.

The Director denied the petition on February 3, 2015. Noting that the petitioning company currently had seven employees, the Director stated: “When a company has a limited number of employees, it becomes questionable as to whether the beneficiary is acting in a managerial or executive function.” The Director acknowledged the Beneficiary’s control of the business, but concluded that the Beneficiary appears to devote the majority of his time to non-qualifying operational functions of the company, and therefore the Petitioner has “not established that the beneficiary will be employed in a managerial capacity.”

On appeal, the Petitioner asserts that the record does not support the Director’s conclusion that the Beneficiary would primarily perform non-qualifying functions. In a subsequent brief, the Petitioner notes that the Director used the phrase “managerial capacity,” but the Petitioner seeks to employ the Beneficiary as an executive, not a manager, and therefore “the decision of the director is totally without merit and deserves no deference.” The Petitioner also asserts that the prior approval of L-1A nonimmigrant status for the Beneficiary demonstrates his eligibility for the immigrant classification sought in this proceeding.

B. Analysis

For the reasons discussed below, we find that the Petitioner has not established that the Beneficiary will primarily perform executive or managerial functions.

As indicated above, the primary issue in this proceeding is whether the Petitioner has established that it seeks to employ the Beneficiary in a qualifying managerial or executive capacity. In general, when examining the executive or managerial capacity of a given position, we review the totality of the record, starting first with the description of the beneficiary’s proposed job duties with the petitioning entity. *See* 8 C.F.R. § 204.5(j)(5). Published case law has determined that the duties themselves will reveal the true nature of the beneficiary’s 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). We then consider the beneficiary’s job description in the context of the petitioner’s organizational structure, the duties of the beneficiary’s subordinates, and any other relevant factors that may contribute to a comprehensive understanding of a given beneficiary’s actual duties and role within the petitioning entity.

In addition, while performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. *See* section 101(a)(44) of the Act.

On appeal, the Petitioner states:

It should be pointed out that petitioner was seeking the services of the beneficiary as the "President" of its company, which is an *executive and not a managerial position*. This was pointed out extensively, and on numerous occasions, both on the petition and throughout the documentation submitted with it, and in [response to] the Request for Evidence. It is therefore obvious that the director totally mischaracterized the job duties to be performed by the beneficiary, and consequently, misapplied the law as it relates to the definition of "executive capacity" as defined in the immigration statutes and regulations.

(Emphasis in original.) The Petitioner has not established that the Director would have approved the petition had the decision emphasized the term "executive" rather than "manager."

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. §1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct[] the management" and "establish[] the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and "receive[] only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

The regulation at 8 C.F.R. § 204.5(j)(5) requires the Petitioner to "clearly describe the duties to be performed by" the Beneficiary. The Petitioner has not met this core requirement. At the time of filing, the Petitioner submitted a job description that appears to be based almost entirely from an entry in the obsolete *Dictionary of Occupational Titles* (4th Ed., Rev. 1991):

189.117-026 PRESIDENT (any industry)

Plans, develops, and establishes policies and objectives of business organization in accordance with board directives and corporation charter: Confers with company officials to plan business objectives, to develop organizational policies to coordinate functions and operations between divisions and departments, and to establish

responsibilities and procedures for attaining objectives. Reviews activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions. Directs and coordinates formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity. Plans and develops industrial, labor, and public relations policies designed to improve company's image and relations with customers, employees, stockholders, and public. Evaluates performance of executives for compliance with established policies and objectives of firm and contributions in attaining objectives. May preside over board of directors. May serve as chairman of committees, such as management, executive, engineering, and sales.¹

The above is not a detailed job description, nor is it meant to be. It is, rather, a generalized picture of the sorts of duties that the president of an unspecified company may perform. The Director, in the RFE, instructed the Petitioner to submit "a definitive statement . . . which describes the beneficiary's job duties, including . . . [a]ll specific daily duties (rather than categories of duties)." The Petitioner's response did not address this request. Instead, the Petitioner submitted the same job description, with percentage figures inserted between sentences.

The assertion that the Beneficiary must "plan, organize, direct and control the organization's major functions" is a general statement of his discretionary authority, but it tells us nothing about how the Beneficiary goes about his functions. The Petitioner, therefore, has not submitted a detailed description of the Beneficiary's specific daily duties. 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. at 1103.

Furthermore, the definitions of executive and managerial capacity have two parts. First, the Petitioner must show that the Beneficiary performs the high level responsibilities that are specified in the definitions. Second, the Petitioner must prove that the Beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Therefore, it cannot suffice to make the general claim that the Beneficiary runs the company, and all the other employees report to him, either directly or through intermediate layers of management.

It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). In this case, the Petitioner has

¹ The original text is available at <http://www.oalj.dol.gov/public/dot/references/dot01f.htm> (visited October 20, 2015).

(b)(6)

Matter of R-I- Inc.

indicated that the Beneficiary has six subordinates, four of whom hold managerial titles, while the Petitioner conducts business at three different locations.

Section 101(a)(44)(C) of the Act requires that, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the Beneficiary's job duties, the Petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development.

The Petitioner has claimed that most of the Beneficiary's subordinates work 40 or more hours per week (the exception being the receptionist, said to work 35 hours per week). Copies of IRS Forms W-2, Wage and Tax Statements, show that the Petitioner's employees earned the following amounts in 2012 (the last full year before the filing of the petition):

The Beneficiary	\$17,375	[REDACTED] manager	\$18,155
General manager	16,100	Warehouse clerk	7,200
Receptionist	12,675	[REDACTED] (title unspecified)	2,140
Sales manager	12,480	[REDACTED] (title unspecified)	2,120
Warehouse manager	12,675		

The record indicates that the Beneficiary was overseas for most of 2012, returning to the petitioning company in August of that year. This explains the low amount of the Beneficiary's compensation, but most of the remaining subordinates did not earn amounts consistent with full-time employment.

Similarly, Forms W-2 from 2011 show that the general manager earned \$21,850 that year, while the other eight employees each earned between \$120 and \$5,850. The quarterly tax return from the second quarter of 2013, which includes the filing date, indicates that the Beneficiary's six subordinates earned between \$2,145 and \$3,380 during that quarter; the sales manager was the only subordinate to receive more than \$3,000. These amounts are not consistent with full-time employment as claimed.

Therefore, the record does not show that the Petitioner employed sufficient full-time subordinate staff to relieve the Beneficiary from performing non-qualifying operational tasks for the company. The Petitioner has not explained how the reasonable needs of the petitioning enterprise justify the Beneficiary's performance of non-managerial or non-executive duties. 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'r 1998).

The Petitioner indicated that the sales manager "is in charge of the sales department," but the Petitioner's organizational charts do not identify any sales staff apart from the sales manager herself. (The "Part-Time Sales Position" claimed in response to the RFE was vacant, and therefore there was no employee in that position to perform sales duties.) If the sales manager is a salesperson herself, then she is not a manager; and if the Petitioner has no "sales department," then the job description is

(b)(6)

Matter of R-I- Inc.

facially inaccurate and unreliable, which casts doubt on the Petitioner's overall credibility. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The Petitioner claimed that the general manager spends 5% of his time "assisting in the recruitment and hiring of personnel," but the record does not establish sufficient personnel turnover to justify that figure. Also, the person identified as the [REDACTED] manager has no subordinates and appears to be the only employee at that site (a rented booth), meaning that he is operating the store rather than managing its operation.

The above information does not support the Petitioner's depiction of an organization that consists almost entirely of full-time managers and executives.

The Petitioner observes that USCIS has previously granted the Beneficiary classification as a nonimmigrant L-1A intracompany transferee in a managerial or executive capacity. USCIS denies many I-140 immigrant petitions after approving prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA U.S. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Bros. Co. Ltd. v. Sava*, 724 F. Supp. 1103. Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa petition, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427.

If the previous nonimmigrant petitions were approved based on the same evidence that is contained in the current record, such approvals would constitute material and gross error on the part of the Director. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). In both the request for evidence and the final denial, the Director clearly articulated the objective statutory and regulatory requirements and applied them to the case at hand. As discussed above, the Petitioner has not established that the Beneficiary would be employed in a qualifying managerial or executive capacity.

Accordingly, we find that the Petitioner did not provide reliable, probative evidence sufficient to establish that it seeks to employ the Beneficiary in the United States in a qualifying managerial or executive capacity. For this reason, USCIS cannot approve this petition.

III. BEYOND THE DIRECTOR'S DECISION

An additional issue not discussed by the Director is whether the Petitioner has established that a qualifying relationship exists with the Beneficiary's overseas employer. To establish a "qualifying relationship" under the Act and the regulations, the Petitioner must show that the Beneficiary's

(b)(6)

Matter of R-I- Inc.

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”).

Here, the Petitioner claims to be a wholly owned subsidiary of [REDACTED]. In support of this contention, the Petitioner submits a copy of a stock certificate (Number 2), which indicates that [REDACTED] holds 200 shares in the petitioning entity.

A review of the documentation in the record, however, raises questions regarding the legitimacy of this claim. The Petitioner’s Articles of Incorporation indicate, in Article III, that the company is authorized to have only 100 shares of stock outstanding at one time. However, as noted above, the stock certificate issued to the foreign entity indicates that the company owns 200 shares of the Petitioner’s stock.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. See *Matter of Church Scientology International*, 19 I&N Dec. 593; see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm’r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm’r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. See *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 1632. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

Here, there is no additional documentation suggesting that the Petitioner subsequently amended Article III of its Articles of Incorporation to permit the authorization of more than 100 shares of stock at one time, thereby raising questions regarding the validity of the claim of ownership set forth in the record. Moreover, a review of the Petitioner’s IRS Form 1125-E, Compensation of Officers, which is included as a supplemental document to the Petitioner’s 2012 IRS Form 1120, U.S. Corporation Income Tax Return, indicates that the Beneficiary owns 100% of the Petitioner’s common stock. This statement, combined with the simultaneous claim that the foreign entity owns

Matter of R-I- Inc.

stock in excess of the amount authorized by the Petitioner's Articles of Incorporation, raises questions regarding whether the claimed qualifying relationship in fact exists. 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. at 591-92.

Based on the unresolved inconsistencies regarding the actual ownership of the petitioning entity, we are precluded from finding that a qualifying relationship exists between the Petitioner and the Beneficiary's overseas employer. For this additional reason, the appeal must be dismissed.²

IV. CONCLUSION

When we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows that we abused our discretion with respect to all of our enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1037 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of R-I- Inc.*, ID# 14086 (AAO Oct. 27, 2015)

² We may deny an application or petition that fails to comply with the technical requirements of the law 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, 1037 (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 we review appeals on a *de novo* basis).