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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[redacted]

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 15 2003

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)

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was approved by the Director, California Service Center. Upon subsequent review, the director issued a notice of intent to revoke and ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn in part and the matter will be remanded to the director for further action.

The petitioner is a California corporation that is engaged in international trade. The petitioner claims to be a subsidiary of Beijing Unitek Technology Uniteel Co. Ltd. (Beijing Unitek), located in the People's Republic of China. It seeks to employ the beneficiary as its financial manager. Accordingly, the employer has petitioned to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

In the notice of intent to revoke, the director stated that "[w]hile adjudicating the [beneficiary's] adjustment of status application, it was realized that that [the] I-140 petition was approved in error as the alien does not qualify for the benefit sought." After reviewing the evidence submitted in response to the notice of intent to revoke, the director conceded that the petitioner had established that it had the ability to pay the beneficiary's proffered wage as required at 8 C.F.R. § 204.5(g)(2). However, the director determined that the petitioner had not established that a qualifying relationship exists between the petitioner and the claimed parent company, or that the beneficiary had been employed in a managerial or executive capacity. The director revoked the approval of the immigrant petition.

On appeal, counsel for the petitioner submits a statement and additional evidence. Counsel asserts that the director revoked the approval in error. Counsel further alleged that the director discriminated against small businesses, specifically focusing on "Chinese cases." In support of the appeal, counsel recites the nonimmigrant regulations at 8 C.F.R. § 214.2(l)(9)(i), relating to the revocation of a nonimmigrant petition for an L-1A intracompany transferee. The current petition is an approved immigrant petition that was revoked on notice in accordance with section 205 of the Act and the regulations at 8 C.F.R. § 205.2(a). Counsel's citation to the incorrect law will not be given any weight. Instead, the AAO will review the current matter in accordance with the appropriate 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 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 first issue to be addressed in this proceeding is whether a qualifying relationship exists between the petitioner and the claimed parent company.

The regulations at 8 C.F.R. § 204.5(j)(2) state 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;
>
> * * *
>
> *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.

The visa classification that the petitioner seeks is intended for multinational executives and managers. The language of the statute specifically limits this visa classification to those executives and managers who have previously worked abroad for at least one year in the preceding three for the overseas entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary. In order to qualify for this visa classification, the petitioner must establish that there is a qualifying

relationship between the United States and foreign entities, in that the petitioning company is the same employer or an affiliate or subsidiary of the overseas company.

In the initial petition, the petitioner indicated that the foreign company owned 100 percent of the United States entity, thereby qualifying the petitioning company as a subsidiary of the overseas company. In support of this claim the petitioner provided a copy of one stock certificate, representing 10,000 shares of common stock issued to the claimed parent company, Beijing Unitek, on September 16, 1994.

In response to two separate requests for evidence, the petitioner submitted additional evidence that contradicts or confuses the original claim. As requested, the petitioner submitted a copy of the company's stock transfer ledger which reflects that the petitioner issued an additional 10,000 shares of stock to Beijing Unitek on February 1, 1999, in exchange for an additional $10,000. The petitioner did not submit a copy of a stock certificate representing this issuance of stock. In addition, the petitioner submitted a copy of its 1997 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, which indicates at Schedule L, line 22b, that the petitioner issued $20,000 in common stock during the 1997 tax year, for a total of $30,000 in capital. The record of proceeding also contains a compiled financial statement for fiscal year 1998 that confirms that the petitioner has issued a total of $30,000 in common stock. Again, the petitioner did not submit stock certificates representing this additional issuance of stock or any evidence that would demonstrate the owner or owners of this common stock. According to the evidence submitted, the petitioner has issued a total of $30,000 in common stock, yet it has only documented the initial issuance of 10,000 shares in exchange for $10,000.

After reviewing the evidence, the director approved the petition on March 26, 1999. Based on a review of the record, the director approved the petition in gross error as he failed to note the conflicting and incomplete evidence regarding the petitioner's claimed ownership. The director's error would constitute "good and sufficient cause" to issue a notice of intent to revoke as the evidence of record at the time the notice was issued would have warranted a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. *See* § 205 of the Act; *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). However, as will be discussed, the director did not address this issue in his notice of intent to revoke but rather focused on a new question that had not been raised previously in the proceeding.

On May 23, 2002, the director issued a notice informing the petitioner of her intent to revoke the approval. Regarding the claimed relationship with Beijing Unitek, the director observed

that the petitioner had not established that the overseas company actually contributed $10,000 in capital in exchange for ownership of the company and the issuance of stock. In the notice, the director stated that the Bureau had previously requested "evidence to establish that the funds used to capitalize the U.S. entity originated from the claimed parent entity abroad." Contrary to this claim, a thorough review of the record indicates that the director originally requested a copy of the petitioner's stock transfer ledger, but did not specifically request evidence of the parent company's initial transfer of funds. Instead, the director raised the issue for the first time in the notice of intent to revoke.

In response to the notice of intent to revoke, the petitioner submitted additional evidence in support of the claimed relationship. Among other documents, the petitioner submitted a copy of the California stock transaction registration, known as Form 260.102.14(c), that was filed with the California Department of Corporations to register the original stock transaction in 1994. This form indicates that the petitioner issued 10,000 shares of stock in exchange for $10,000. The petitioner also submitted copies of the minutes from the incorporator's initial organizational meeting in 1994. This document authorized the sale of 10,000 shares of stock to Beijing Unitek for $10,000. In addition, the petitioner submitted a bank statement representing a deposit of $10,000 in the petitioner's corporate bank account in 1994. Finally, the petitioner submitted a translated letter from the overseas company which certifies that the board of directors of Beijing Unitek decided to set up a subsidiary in the United States in September 1994. The letter specifically states that, "An amount of US$10,000 in cash has been dispersed by the financial department of this company for [redacted] who has duly signed a receipt, to carry to the United States for use as the subsidiary entity's registered capital."

The director revoked the petition's approval on August 21, 2002. The director determined that the submitted evidence did not establish that the Chinese company had actually contributed the initial investment. In her decision, the director reviewed the bank statements that were included in the record and determined that none of the wire transfers could be attributed to the claimed parent company. The director also noted that the attorney's cover letter referred to a wire transfer rather than the claimed "hand carry" of the funds. However, the noted error appears to be a typographical error on the part of the attorney and does not undermine the petitioner's consistent claim that the funds were hand carried. The director further discounted the translated letter from the claimed parent company by stating that there is no evidence that the funds were hand-carried to the states, such as U.S. Customs Form 4790 or copies of an annotated passport page. It must be noted that the director did not request copies of Form 4790

or the passport page at anytime during this proceeding. The petitioner's failure to submit specific evidence that was never requested by the director cannot be used to discredit a petitioner's otherwise consistent claim. Finally, the director noted that the bank statement "reflects that the $10,000 transaction was a customer 'deposit' and not the credit of a stock purchase." As observed by counsel on appeal, the AAO takes notice that the deposit of funds in a bank account will not normally be "credited" or annotated as a stock purchase on a monthly bank statement.

On appeal, counsel objects to the director's request for a "noxiously long list of additional evidence to show the transfer of funds from the parent company to the . . . subsidiary." Counsel asserts, in part, that the submitted evidence clearly demonstrates that a qualifying business relationship exists between the petitioner and the claimed parent company.

Upon review, the petitioner has submitted sufficient evidence to establish that the claimed parent company, Beijing Unitek, contributed the initial $10,000 in exchange for 10,000 shares of the petitioning company's common stock. In response to the director's notice of intent to revoke, the petitioner submitted copies of stock certificate number one, the petitioner's initial bank statement, the minutes from the incorporator's initial organizational meeting in 1994, and a translated letter from the overseas company which confirms that the company issued the funds to the president of the petitioner for the purpose of establishing the company. The submitted evidence is consistent and supports the petitioner's claim that Beijing Unitek supplied $10,000 in exchange for the initial issuance of stock. After careful review, the AAO has found nothing in the record to contradict this claim. For this reason, the director's decision will be withdrawn in part as it relates to the 1994 transfer of funds and the initial issuance of 10,000 shares of stock.

However, the issue of the claimed qualifying relationship may not be resolved at this time as the record contains many inconsistencies. As discussed previously, the petitioner has submitted evidence which contradicts the claimed ownership structure. The petitioner has submitted a copy of one stock certificate representing the initial issuance of 10,000 shares to Beijing Unitek, but also submitted evidence that indicates that the petitioning company has issued an additional $20,000 in capital stock. The claimed relationship hinges upon the petitioner demonstrating that the claimed parent company owns more than half of the entity and controls the entity. 8 C.F.R. § 204.5(j)(2). The petitioner has not accounted for a majority of the issued stock.

Contrary to the director's decision, the error in adjudication was

not that the petitioner failed to establish that the initial transfer of funds came from the overseas company, but rather the director failed to observe that the petitioner submitted conflicting evidence regarding the shares of stock that had been issued. The director did not request evidence of the transfer of funds until the notice of intent to revoke, contrary to the director's claim. The director did not request the evidence that is necessary to establish the exact number of shares issued and the percentage of shares held by the overseas company.

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, 8 U.S.C. § 1155, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime, supra*). The present decision to revoke may not be sustained or overturned as the director did not address the critical issue and the petitioner has not had an opportunity to provide "evidence or explanation . . . in rebuttal to the notice of intention to revoke." *Id.*

As it relates to the petitioner's claimed relationship, the decision of the director will be withdrawn and the matter will be remanded to the director so that he may issue a new notice of intent to revoke. The notice must request the evidence necessary to establish the total number of shares issued, the exact number issued to the claimed parent company, and the subsequent percentage ownership and its effect on corporate control. This evidence shall include copies of all issued stock certificates, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, the minutes of relevant annual shareholder meetings, California Form 260.102.14(c) stock transaction registrations, and evidence of the payments made for the stock issuance. Additionally, the 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. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986)(in nonimmigrant visa proceedings). The director shall provide the petitioner 30 days to provide the necessary evidence.

As the petitioner has not been provided an opportunity to address this issue, the petitioner may provide a supplemental brief. The petitioner may also supplement the record with additional argument or evidence regarding the second issue raised by the director, whether the beneficiary has been and will be employed in a primarily managerial or executive capacity.

Upon reviewing the submitted evidence, the director shall enter a new decision. So that the matter may be resolved in an expeditious manner, the director shall enter a new decision and shall certify that decision to the AAO for review within 30 days of receiving the petitioner's response.

ORDER: The decision of the director is withdrawn in part and the matter is remanded to the director for further action and a new decision, in accordance with the discussion above. Upon entering a new decision on the necessary issue alone, the director shall certify the matter to the AAO for review.