

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

~~CONFIDENTIAL~~

B4

[Redacted]

FILE: [Redacted]  
WAC 96 244 50639

Office: CALIFORNIA SERVICE CENTER Date: **AUG 12 2005**

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:

[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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, initially approved the employment-based visa petition. Upon subsequent review of the record, including information obtained from an overseas investigation, the director issued a notice of intent to revoke and ultimately revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be a corporation organized in the State of California in February 1994. It claims to operate a service station and import and wholesale clothing. The petitioner seeks to employ the beneficiary as its president and chief executive officer. 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 petition was filed in September 1996. The legacy Immigration and Naturalization Services approved the petition on November 16, 1996. In June 2003, Citizenship and Immigration Services (CIS) requested an overseas investigation to confirm the beneficiary's employment history with the petitioner's claimed parent company. An investigation was conducted on August 12, 2003. As a result of information obtained from the investigation, the director issued a notice of intent to revoke approval of the petition on September 16, 2004. The director noted that good and sufficient cause existed to revoke the petition, requested additional evidence to aid in overcoming the director's determinations, and afforded the petitioner 30 days to offer evidence in support of the petition and in opposition to the proposed revocation.

Counsel for the petitioner provided a rebuttal brief and attached affidavits in support of the rebuttal. Upon review of the evidence submitted, the director determined that the petitioner had not established a qualifying relationship with the beneficiary's foreign employer. On November 4, 2004, the director issued a decision revoking approval of the petition, concluding that the petitioner does not have a qualifying relationship with the beneficiary's claimed foreign employer.

On appeal, counsel for the petitioner cites *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d 127 (2d Cir. 2004), issued by the United States Court of Appeals for the Second Circuit on August 2, 2004. Counsel asserts that CIS does not have the authority to revoke a previously approved immigrant visa petition when the alien is already inside the United States. Counsel also claims that the information obtained in the overseas investigation was a result of a "misunderstanding of communications" of statements made to the overseas investigator.

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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

The preliminary issue in this matter regards counsel's assertion in reference to the recent opinion, *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d at 127 (2d Cir. 2004), issued by the United States Court of Appeals for the Second Circuit. The AAO acknowledges that in that opinion, the court interpreted the third and fourth sentence of section 205 of the Act, 8 U.S.C. § 1155 (2003), to render the revocation of an approved immigrant petition ineffective where the beneficiary of the petition did not receive notice of the revocation before beginning his journey to the United States. *Firstland*, 377 F.3d at 130. Counsel asserts that the reasoning of this opinion must be applied to the present matter and accordingly, CIS may not revoke the approval because the beneficiary did not receive notice of the revocation before departing for the United States, since he was already in the United States when the director issued the revocation.<sup>1</sup>

According to the record of proceeding, the petitioner is located in the State of California; thus, this matter did not arise in the Second Circuit and *Firstland* was never a binding precedent. Even as a merely persuasive precedent, moreover, *Firstland* is no longer good law.

On December 17, 2004, the President signed the Intelligence Reform and Terrorism Prevention Act of 2004 (S. 2845). *See* Pub. L. No. 108-458, \_\_ Stat. \_\_ (2004). Specifically relating to this matter, section 5304(c)

---

<sup>1</sup> The *Firstland* opinion summarily overturned 35 years of established agency precedent. *See Matter of Vilos*, 12 I&N Dec. 61 (BIA 1967). Counsel's arguments illustrate the illogical effects of the Second Circuit's reasoning: In the present matter, the beneficiary initially entered the United States as a nonimmigrant L-1A intracompany transferee prior to the filing of the Form I-140 immigrant petition and prior to the revocation of the petition's approval. Accordingly, it was physically impossible for CIS to have notified the beneficiary of the revocation before he departed for the United States. In effect, counsel's interpretation of *Firstland* would have created a situation where any alien would have an irrevocable immigrant visa petition if the alien simply waited until after he or she arrived in the United States to file the petition.

of Public Law 108-458 amends section 205 of the Act by striking "Attorney General" and inserting "Secretary of Homeland Security" and by striking the final two sentences. Section 205 of the Act now reads:

The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition.

Furthermore, section 5304(d) of Public Law 108-458 provides that the amendment made by section 5304(c) took effect on the date of enactment and that the amended version of section 205 applies to revocations under section 205 of the Act made before, on, or after such date. Accordingly, the amended statute specifically applies to the present matter and counsel's *Firstland* argument no longer has merit.

Generally, the director's decision to revoke the approval of a petition will be affirmed, notwithstanding the submission of evidence on appeal, where a petitioner fails to offer a timely explanation or rebuttal to a properly issued notice of intention to revoke. *See Matter of Arias*, 19 I&N Dec. 568, 569 (BIA 1988). Regarding the revocation on notice of an immigrant petition under section 205 of the Act, 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 un rebutted, 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*, 19 I&N Dec. 450 (BIA 1987)).

CIS regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed. *See* 8 C.F.R. § 245.1(a). If the beneficiary of an approved visa petition is no longer eligible for the classification sought or if the petition was approved in error, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for "good and sufficient cause." Notwithstanding the CIS burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

The substantive issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the 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 a September 4, 1996 letter appended to the petition, the petitioner stated that [REDACTED] a United Arab Emirates company, owned 100 percent of the petitioner. The petitioner also submitted: its Articles of Incorporation showing it is authorized to issue 10,000 shares of stock; organizational minutes showing 10,000 shares had been issued to [REDACTED] for the consideration of \$1.00; and, a stock certificate dated May 4, 1995 issuing 10,000 shares to [REDACTED]

The record contains the following evidence submitted in support of the petition: (1) evidence that the beneficiary entered into an agreement to purchase a gasoline service station in April 1994; (2) franchise and lease documentation addressed to the beneficiary doing business as MVPA Shell; (3) the beneficiary's 1995 Internal Revenue Service (IRS) Form 1040, U.S. Individual Income Tax Return, showing that the beneficiary did not receive a salary or wages but instead received business income of \$24,237; and, (4) three invoices for May, June, and July 1994. The record contains a partnership deed outlining the ownership interests of a foreign entity between [REDACTED] with a 51 percent interest, the beneficiary with a 24.5 percent interest, and [REDACTED] with a 24.5 percent interest.

The director, after an apparent cursory review, approved the petition based on this limited information. The director's approval was clearly gross error.

As observed above, the director requested an overseas investigation to confirm the beneficiary's employment history with the foreign entity, prior to adjudicating the beneficiary's Form I-485, Application to Register Permanent Residence or Adjust Status. On August 2, 2003, a fraud prevention officer visited the premises of the petitioner's claimed parent company. The officer interviewed the managing director [REDACTED] (the beneficiary's brother) who indicated that the beneficiary was not a partner in the foreign enterprise, that the

petitioner had no connection to the foreign entity, that the foreign entity, Steel Trading Company, LLC, is a local, not multinational company, and that he would be happy to help his brother if his brother needed his company's connections.

On September 16, 2004, the director issued the notice of intent to revoke, repeating the observations of the overseas investigator and noting that the petitioner's 1994 IRS Form 1120, U.S. Corporate Income Tax Return, provided inconsistent information regarding the petitioner's ownership. The director specifically noted that the petitioner failed to note the name of the person or entity that owned 100 percent of the petitioner and that the petitioner had not acknowledged that a foreign entity or person owned the petitioner on the IRS Form 1120.

In the October 15, 2004 rebuttal, counsel for the petitioner asserted that the individual interviewed by the overseas investigator was misunderstood. Counsel attached [REDACTED] sworn declaration stating: that the foreign entity, [REDACTED] is a partnership between [REDACTED], the beneficiary, and himself and that the beneficiary worked with [REDACTED] from 1981 to 1994 as its managing partner; that either the interviewing officer misunderstood his answers or he misunderstood the interviewing officer's questions; and that the petitioner was established under 100 percent ownership of Steel Trading Company and that the beneficiary was appointed its director. Counsel also attached the beneficiary's declaration and the declaration of [REDACTED] attesting to the beneficiary's ownership interest in the foreign entity and the foreign entity's ownership of the petitioner. Counsel contended that the petitioner's IRS Form 1120 contained typographical errors and that the petitioner's accountant had amended the IRS Form 1120. Counsel also submitted the accountant's October 14, 2004 declaration attesting that he had amended the petitioner's IRS Form 1120 and would file it with the IRS. Counsel also submitted other extraneous documentation in an attempt to refute the director's notice of intent to revoke.

On November 4, 2004, the director determined that: (1) the affidavits submitted in rebuttal to the notice of intent to revoke were self-serving and "after the fact evidence;" (2) [REDACTED] original statement to the overseas investigator would stand; (3) the amended tax return was "moot" as it was submitted ten years after the original had been filed; and (4) other evidence submitted was either self-serving or not substantiated. The director revoked the petition observing that the petitioner had not submitted sufficient evidence to overcome the grounds of revocation.

On appeal, counsel for the petitioner repeats the assertions set forth in the rebuttal in addition to citing *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d at 127 (2d Cir. 2004). Counsel argues that the declarations, amended tax return, and other evidence had been submitted to reconcile inconsistencies and establish the truth of the matter.

Counsel's assertions are not persuasive. The record does not contain substantiating evidence that the foreign entity owns the petitioner. 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. *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). 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. The petitioner has not established this essential element of eligibility for this visa classification.

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. at 595. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

In this matter, the petitioner has not provided any evidence that the foreign entity provided capital to fund the initial start-up of the petitioner. The minutes of the petitioner's organizational meeting indicate that the petitioner issued stock for the consideration of \$1.00. The record does not substantiate that the foreign entity actually provided the capital to fund the petitioner and raises questions regarding the legitimacy of the issued stock certificate. The payment of only \$1.00 for all the petitioner's issued stock suggests that the stock certificate was issued as a convenience to establish a qualifying relationship, rather than an actual depiction of the petitioner's ownership and control. Moreover, the record contains an unsigned joint venture agreement dated February 1994, allegedly between an individual and the foreign entity. The record remains unclear as to the relevance of this document. Upon review of the totality of the evidence, the AAO does not consider that the affidavits submitted "to point to the truth of the matter" overcome the obvious attempt to create a qualifying relationship between the petitioner and the foreign entity when none actually existed.

Regarding the 1994 IRS Form 1120 and the claim that the IRS Form 1120 was amended, the AAO observes that like a delayed birth certificate, the amended tax returns ten years after the claimed transaction raise serious questions regarding the truth of the facts asserted. *Cf. Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991)(discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings). The petitioner has not provided later copies of IRS Forms 1120 and has not provided evidence that any "amended" IRS Forms 1120 have been actually submitted to the IRS. 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)).

The AAO finds no need to rely on the overseas investigator's report in this matter. While the AAO does not find it necessary to rely on the investigator's report in this matter, the AAO notes that the petitioner has not submitted sufficient independent and objective evidence to overcome the investigative report. The lack of substantiating documentary evidence in the record casts doubt on the veracity of the affidavits submitted. The record fails to substantiate the petitioner's claim that it is a wholly owned subsidiary of the foreign entity.

Rather, the record suggests that the petitioner was created as a shell company to enable the transfer of the beneficiary to the United States.

Beyond the decision of the director, the petitioner has not established that it is currently doing business or had been doing business for one year prior to filing the Form I-140 petition. The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*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." To establish that the petitioner is a multinational entity and that the beneficiary will be employed as a multinational manager or executive, both the petitioner and the foreign entity must engage in the regular, systematic, and continuous provision of goods or services.

In this matter, the petitioner claims that it operates a gasoline service station as well as importing and wholesaling clothing. However, the record shows that the beneficiary entered into agreements to purchase and operate the service station. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). The record does not establish that the petitioner, rather than the beneficiary, is in the business of operating a service station. The record also does not contain a sufficient number of invoices over a period of time to establish that the petitioner imports and sells clothing in a regular, systematic, and continuous manner. Again, 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. at 165.

Further, the petitioner has not established that the beneficiary's position for the U.S. entity will be primarily managerial or executive. The petitioner in its September 4, 1996 letter in support of the petition states that the beneficiary "is overseeing the overall operations of the company and he is engaged in an international operation by the importation of clothing and other items for company by virtue of over \$1 Million Dollars." The petitioner states on the Form I-140 petition that it employs six individuals. The record contains copies of IRS Forms W-2, Wage and Tax Statement, issued to four individuals in 1995 for sums between \$2,000 and \$10,400. The record does not contain additional substantive evidence regarding the beneficiary's duties, the duties of his subordinates, or the role each individual plays in the petitioner's business.

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). 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). In this matter, the petitioner has not provided details regarding the beneficiary's actual 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. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990). Furthermore, the petitioner has not substantiated that it employed six personnel when the petition was filed. The record contains evidence showing only four intermittent or part-time employees in 1995. 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). Again, the record lacks documentary evidence to support the petitioner's claim that the beneficiary will be engaged primarily in managerial or executive duties. *Matter of Soffici*, 22 I&N Dec. at 165.

Finally, the record does not establish the petitioner's ability to pay the beneficiary the proffered annual wage of \$50,000. The regulation at 8 C.F.R § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner has not provided documentary evidence in the form of copies of annual reports, pertinent federal tax returns, or audited financial statements to demonstrate its ability to pay the proffered wage. Again, 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. at 165.

For these additional reasons, the approval of the petition was gross error. The record does not establish the beneficiary's eligibility for this visa classification.

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).

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. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.