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U.S. Citizenship
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Services

B4

[Redacted]

FILE: [Redacted]
EAC-02-026-52707

Office: VERMONT SERVICE CENTER

Date: JAN 25 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]

PUBLIC COPY

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, Vermont Service Center, initially approved the employment-based petition. Upon subsequent review, the director properly 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 is a privately-held corporation, organized for the purpose of distributing brand name fragrance products. The petitioner claims that it is an affiliate of [REDACTED] located in Markham, Canada. It 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 initially approved the petition on November 26, 2001. Upon subsequent review, the director observed that: (1) the petitioner ceased doing business over two months prior to approval of the petition; (2) the beneficiary has not worked for the petitioner since the petitioner ceased doing business; (3) a second company owned by the beneficiary, for which he claims to work, has become inactive; and (4) it appears that the beneficiary is not currently working for any business entity in the United States. The director issued a notice of intent to revoke on March 3, 2004, affording the petitioner an opportunity to offer evidence in support of the petition and in opposition to the proposed revocation.

On April 1, 2004, the petitioner's former counsel asserted that, despite the fact that the beneficiary's second business closed due to a fire, the beneficiary continued to perform the duties of an executive on behalf of the company. On August 4, 2004, the petitioner's former counsel submitted a second letter to correct several dates in the initial response, and to report that the beneficiary continued to act as an executive and manager despite the lack of a liquor license for his liquor store. Upon review of the rebuttal to the notice of intent to revoke, the director revoked the approval of the petition on September 20, 2004, determining that the petitioner's response confirmed that the beneficiary was not working for the petitioner or the beneficiary's second business.

On appeal, the petitioner's current counsel asserts that the revocation decision is prohibited by section 205 of the Act, 8 U.S.C. § 1155 (2003), as interpreted by the United States Court of Appeals for the Second Circuit in *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d 127 (2d Cir. 2004).

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).

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, 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).

Moreover, by itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals (BIA) 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 fraud, misrepresentation,

The primary issue in this proceeding is whether the director's revocation decision is prohibited by section 205 of the Act, 8 U.S.C. § 1155 (2003).

In her brief, counsel draws the AAO's attention to a recent opinion, *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d at 127, issued by the United States Court of Appeals for the Second Circuit on August 2, 2004. In that opinion, the court in *Firstland* 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.¹

According to the Form G-28 submitted on appeal, the petitioner lives in Herkimer, New York; thus, this case did arise in the Second Circuit. Although this case did arise in the Second Circuit, *Firstland* is no longer a binding precedent.

On December 17, 2004, the President signed the Intelligence Reform and Terrorism Prevention Act of 2004 (S. 2845). See Pub. L. No. 108-458, 118 Stat. 3638 (2004). Specifically relating to this matter, section 5304(c) 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.

[REDACTED]

The AAO notes that counsel failed to address the director's grounds for revoking approval of the petition, as discussed below.

The director initially approved the present petition on November 26, 2001. On January 31, 2002, the beneficiary filed a Form I-485, Application to Register Permanent Resident or Adjust Status. On October 22, 2003, the director issued correspondence to the beneficiary requesting additional evidence in support of the Form I-485 application. In response, on November 26, 2003 the beneficiary submitted a letter dated November 3, 2003 in which he indicated that the petitioner's operations were "shelved" due to the September 11, 2001 terrorist attacks in New York City. The beneficiary further stated that his second business, a liquor store, was damaged due to an electrical fire, and he expected the necessary repairs to be completed in November 2003. Based on this information, on March 3, 2004 the director issued correspondence notifying the petitioner of CIS's intent to revoke the approval of the present petition. In pertinent part, the director stated the following:

It has now come to the attention of this office that the beneficiary is not working for the instant petitioning entity for which he was approved [The beneficiary] admits that the business of the instant petitioning entity of which he was majority owner and for which he received this service's approval was "shelved" in [the] wake of the terrorist attacks of September 11, 2001, in New York City. This is a time frame more than two-and-a-half months prior to the approval of the instant petition. Further, a second company of which he claims ownership and employment has also been rendered inactive due to a recent conflagration. Therefore, the beneficiary does not appear to be currently working for any business entity in the United States.

In a response dated April 1, 2004, the petitioner's prior counsel asserted that, on or about August 10, 2001, the petitioner filed an additional Form I-129, Petition for a Nonimmigrant Worker, seeking to classify the beneficiary as an L-1 intracompany transferee and providing information about the beneficiary's liquor store. Counsel submitted documentation to show that the beneficiary's liquor store was damaged by fire on or about April 19, 2003. Counsel asserted that, despite the fact that the beneficiary's liquor store closed due to the fire, he continued to perform the duties of an executive on behalf of the company. Counsel indicated that the beneficiary intended to reopen his store in "late [S]pring" of 2004. Counsel did not address whether the petitioner continued to operate after the September 11, 2001 terrorist attacks in New York City. On August 6, 2004, counsel submitted a second letter to correct several dates in the initial response, and to report that the beneficiary continued to act as an executive

that, according to the opinion in *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d 127 (2d Cir. 2004), the director lacks authority to revoke the present petition. As discussed above, counsel's argument no longer has merit.

Upon review, the petitioner has not established eligibility for the requested immigrant visa and the director properly revoked approval for good and sufficient cause. As previously noted, the statute and the regulation at 8 C.F.R. § 204.5(j) provide strict requirements that the petitioner must satisfy prior to the approval of this immigrant visa petition. Upon review, the petitioner has not satisfied many of the enumerated evidentiary requirements. Contrary to 8 C.F.R. § 204.5(j)(3)(i)(D), the petitioner has not established that it was "doing business" at the time of filing, or thereafter continued to do business, in a regular, systematic, and continuous manner. Furthermore, the petitioner has not established that the beneficiary is primarily performing managerial or executive duties, contrary to 8 C.F.R. § 204.5(j)(5). Although the petitioner claims that the beneficiary has continued to act as a manager or executive after the petitioner's liquor store went inactive, the petitioner has submitted a vague statement of the duties that are purportedly performed by the beneficiary. Rather than providing an account of the beneficiary's day-to-day duties, the description of the duties serves to paraphrase the statutory definitions. See § 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). For these reasons, the petition may not be approved and the appeal will be dismissed.

Finally, beyond the decision of the director, the petitioner has not submitted evidence of the current financial status of the United States operation and there is no evidence that the petitioner can pay the beneficiary's proffered salary. 8 C.F.R. § 204.5(g)(2). For this additional reason, the petition may not be approved and the appeal will be dismissed.

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).

Based on the foregoing, the AAO will affirm the director's decision and dismiss the appeal.