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FILE: [REDACTED]  
WAC 01 094 53366

Office: CALIFORNIA SERVICE CENTER

Date: JUL 22 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:



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 preference visa petition was initially approved by the Director, California Service Center. Upon further review, the director determined that the petitioner was not eligible for the immigration benefit sought and reopened the matter. A notice of intent to revoke approval of the petition was issued and the petitioner was allowed 30 days to respond. The director 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 general partnership, which was organized for the purpose of engaging in the wholesale and retail of groceries and liquor. It seeks to employ the beneficiary as its vice president/general manager. 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 determined that the beneficiary would not be employed in a managerial or executive capacity and that the petitioner failed to establish that it has a qualifying relationship with a foreign entity.

On appeal, counsel disputes the director's conclusions and submits a brief in support of her arguments.

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

\* \* \*

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The first issue in this proceeding is whether the petitioner established at the time of the filing of the petition that the beneficiary would be employed in a capacity that is managerial or executive.

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

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.

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

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.

In support of the petition, the petitioner submitted the following statement with regard to the beneficiary's proposed position in the United States:

He is responsible for the management of the business operation, planning and the formulation of long range business objectives, development of organizational policies, establish [sic] responsibilities and procedures for attaining objectives, oversee [sic] financial functions, expand [sic] markets and develop policies to promote the company's image with full authority in the hiring and firing of employees.

On April 11, 2001, the director issued a request for additional evidence (RFE) instructing the petitioner to be more specific regarding the duties the beneficiary would perform in the proposed position. The petitioner was also asked to assign a percentage of time the beneficiary would spend performing each of the listed duties.

In response, the petitioner stated that the beneficiary's duties in the United States would include purchasing, which would consume 25% of his time; marketing, which would consume 20% of his time; finance, which would consume 5% of his time; and managing the company, which would consume 50% of his time. The petitioner failed to list any of the beneficiary's specific duties.

On May 7, 2004, the director issued a notice of his intent to revoke (ITR) the approval of the petition. The ITR was based on the director's determination that the petitioner failed to establish the following at the time of the filing of the petition: 1) the beneficiary would be employed in a managerial or executive capacity; 2) the petitioner had a qualifying relationship with a foreign entity; and 3) the petitioner had the ability to pay the beneficiary's proffered wage. The petitioner was asked to submit additional evidence to overcome these grounds, which served as the basis for the director's intent to revoke the approval of the petition. In regard to the description of the beneficiary's duties, the petitioner was specifically instructed to provide a list of the beneficiary's typical day of work.

Although the petitioner submitted a response to the ITR, in regard to the request for a more detailed description of the beneficiary's proposed duties, the petitioner simply stated that this information was provided earlier in its response to the director's April 2001 RFE. The petitioner did not comply with the director's specific request for a list of duties that comprise the beneficiary's typical day on the job.

On June 22, 2004, the director issued a notice revoking the prior approval of the petition. The director's decision was partly based on the conclusion that the petitioner did not provide an adequate description of the beneficiary's proposed duties such that would warrant a determination that the beneficiary would be employed in a managerial or executive capacity. The director specifically stated that the descriptions of duties that the petitioner had provided were too vague and failed to convey an understanding of what the beneficiary would do on a daily basis.

On appeal, counsel asserts that Citizenship and Immigration Services (CIS) failed to specify with sufficient clarity the information it sought to obtain and referred to the percentage breakdown provided in one of its earlier submissions. Contrary to this assertion, however, the AAO finds that the director's request for a specific description of the beneficiary's typical day of work was quite clear. By requesting that the petitioner provide "a *more* detailed description of the beneficiary's duties," the director unmistakably informed the petitioner of his dissatisfaction with the petitioner's earlier description of the beneficiary's duties. (Emphasis added.) Further, the director spelled out exactly the type of detail he was looking for in a description of duties by instructing the petitioner to submit a list of duties that comprise the beneficiary's typical day on the job. Although the petitioner previously submitted a percentage breakdown of the beneficiary's various activities, the breakdown did not reveal any of the beneficiary's actual daily duties. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the 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).

In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant matter, the petitioner merely provided a brief list of the beneficiary's general job responsibilities, which include purchasing, marketing, finance, and company management. However, the petitioner failed to translate this general overview of the beneficiary's position into an actual list of duties. As such, CIS is left without any substantive information of what the beneficiary would actually do on a day-to-day basis. The petitioner's failure to provide this crucial information resulted in revocation of the approval of the petition. Even if the AAO were to give the petitioner the benefit of assuming that the beneficiary oversees the work of a managerial employee based on the subordinate employee's job title and position within the organizational chart, the fact remains that the regulation at 8 C.F.R. § 204.5(j)(5) requires the petitioner to provide a detailed description of the beneficiary's job duties. In the instant matter, the petitioner has failed to comply with that regulatory requirement. As the record lacks sufficient information to indicate what specific duties the beneficiary would primarily be performing, the AAO cannot affirmatively conclude that the beneficiary would be employed in a managerial or executive capacity.

The other issue in this proceeding is whether the petitioner has established that it has had a qualifying relationship with a foreign entity since the date the petition was filed.

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 the statement submitted in support of the petition, the petitioner stated that the U.S. and foreign entities are affiliates by virtue of having a common single owner who owns more than half of each company. Specifically, based on the ownership breakdowns [REDACTED] owns 60% of each entity. Contrary to the director's erroneous interpretation of the above definition of *affiliate*, when a petitioner submits sufficient evidence to establish one person's ownership of more than 50% of the U.S. and foreign entities, such a petitioner may be deemed as a qualifying entity. *See* 8 C.F.R. § 204.5(j)(2) for definition of *multinational*. Therefore, the director's erroneous comments with regard to the definition of *affiliate* are hereby withdrawn.

Additionally, the director stated that Schedule K-1 of the petitioner's Form 1065 Partnership Tax returns for the years 2000, 2002, and 2003 shows that [REDACTED] and [REDACTED] each owns 50% of the U.S. business. The director properly pointed out that this evidence is factually inconsistent with the claim that the U.S. and foreign entities are 60% owned by Mr. [REDACTED]. However, the petitioner's original Partnership Agreement, which was executed on December 30, 1998, supports the petitioner's claim that [REDACTED] owns 60% of the U.S. business. Although the petitioner executed an Addendum to Partnership Agreement on January 1, 1999 altering the petitioner's profit and loss-sharing scheme, it made no mention of any changes in its ownership distribution. In addition, while the AAO acknowledges that the petitioner's subsequent partnership returns are inconsistent with its original Partnership Agreement, the petitioner's original Partnership Agreement is a contemporaneous document, which supports the petitioner's claim. The record contains no contemporaneous documentation to suggest that the original ownership distribution was altered in any way. This fact, coupled with a July 8, 2004 letter from the petitioner's accountant claiming that Schedule K-1 of the petitioner's various tax returns were erroneous, suggests that the petitioner's ownership distribution was unlikely altered. Therefore, Jashavantbhai Chaudhary appears to be the owner of 60% of the U.S. business. As such, the petitioner appears to have established a qualifying relationship with a foreign entity.

Notwithstanding the petitioner's apparent qualifying relationship, the record does not warrant reversal of the director's decision to revoke the approval of the petition. On appeal, counsel vehemently disputes the director's authority to take such action. In her appellate brief, counsel draws the AAO's attention to a recent opinion issued by the United States Court of Appeals for the Second Circuit, *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d 127 (2d Cir. 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.

According to the Form G-28 submitted on appeal, the petitioner is located in Los Angeles, California; thus, this case did not arise in the Second Circuit, as acknowledged by counsel.

Additionally, 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. Therefore, even if the petitioner was located in the

Second Circuit, the amended statute would specifically apply to the present matter and counsel's *Firstland* argument would no longer have merit.<sup>1</sup>

Beyond the decision of the director, 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the instant matter, the petition was filed on January 22, 2001. The first page of the petitioner's 2001 tax return indicates that the petitioner was operating at a net loss of \$16,201 the year the petition was filed. As such, the record suggests that the petitioner did not have the ability to pay the beneficiary's proffered wage of \$22,000 per year at the time the petition was filed.

Additionally, the first-preference immigrant status under section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C), requires that the beneficiary have a permanent employment offer from the petitioner. The petitioning employer must be a United States entity. See 8 U.S.C. § 204.5(c). A petitioner who is a nonimmigrant temporary worker is not competent to offer permanent employment to an alien beneficiary for the purpose of obtaining an immigrant visa for the beneficiary under section 203(b)(1)(C) of the Act. *Matter of Thornhill*, 18 I&N Dec. 34 (Comm. 1981).

In the instant matter, the record lacks sufficient documentation to indicate that Jashavantbhai Chaudhary, the majority owner of the U.S. entity, is a U.S. citizen or permanent resident. As case law has established that neither a sole proprietorship nor a partnership is a legal entity apart from its owner or owners, *Matter of United Investment Group*, 19 I&N Dec. 248 (Comm. 1984), the AAO cannot make a determination with any degree of certainty that the petitioner is by definition a U.S. employer.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional ground discussed in the paragraphs above, the director's decision to revoke the approval of the petition cannot be overturned.

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<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 entered the United States as a nonimmigrant L-1A, prior to the filing of the Form I-140 immigrant petition and more than three years 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.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.