

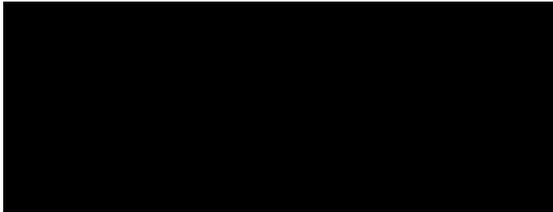
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U.S. Citizenship
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Office: CALIFORNIA SERVICE CENTER

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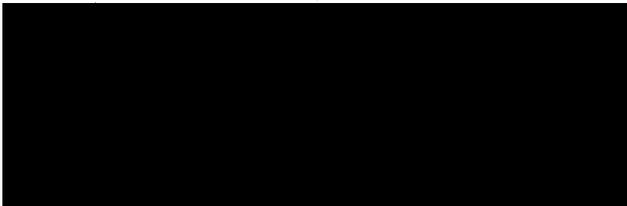
Petitioner:



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)

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 Director, California Service Center, initially approved the employment-based visa petition. Upon subsequent review of the record, 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 is a corporation organized in the State of California in April 1981. It provides reprographics services. The petitioner seeks to employ the beneficiary as its general manager, graphic paper. 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 March 20, 1997. The legacy Immigration and Naturalization Services approved the petition March 26, 1997. On May 5, 2004, the director issued a notice of intent to revoke approval of the petition. The director observed that during the adjudication of the beneficiary's Form I-485, Application to Register Permanent Residence or Adjust Status, the director realized the Form I-140 had been approved in error. The director determined that the petitioner had not established a qualifying relationship with the beneficiary's foreign employer. 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.

On June 24, 2004, the director issued a revocation decision determining that the evidence submitted by the petitioner is not sufficient to show an affiliate relationship. The director concluded that the evidence failed to establish that the petitioner and the foreign company have a qualifying relationship.

On appeal, counsel for the petitioner asserts that the director's decision is in error.

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).

Section 205 of the Act, 8 U.S.C. § 1155 (2005), states: "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."

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 Esteime*, . . . 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 Esteime*, 19 I&N Dec. 450 (BIA 1987)).

Citizenship and Immigration Services (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).

The 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 March 17, 1997 letter appended to the petition, the petitioner stated that one individual [REDACTED] owned and controlled 80 percent of the petitioner and 50 percent of [REDACTED] (Private) the foreign entity. The petitioner submitted a December 2, 1993 letter from its legal counsel stating that [REDACTED] owned 80 percent of the petitioner and a second individual owned 20 percent of the petitioner. In response to a request for further evidence in regards to the beneficiary's I-485 application, the petitioner submitted its Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation. The 1996 IRS Form 1120S on Schedule K-1 showed that [REDACTED] owned 58.339726 percent of the petitioner.

Regarding the foreign entity, the petitioner initially provided a copy of a share certificate dated December 4, 1996 showing that [REDACTED] had been issued 25,000 shares of the foreign entity. The beneficiary initially submitted evidence in support of his Form I-485 application including a November 4, 1998 letter from the foreign entity indicating that [REDACTED] held 75,000 shares of the 150,000 shares issued. The beneficiary also provided copies of the foreign entity's share certificates to [REDACTED]. The first share certificate dated December 4, 1996 issued 25,000 shares to [REDACTED] the second share certificate dated April 2, 1997 issued 18,000 shares to [REDACTED] and the third share certificate also dated April 2, 1997 issued 32,000 shares to [REDACTED]. In response to a request for further evidence in regards to the beneficiary's

Form I-485 application, the petitioner submitted the foreign entity's May 1985 Articles of Association showing that the foreign entity had issued four shares, one each to four individuals, including one to the beneficiary.

On May 5, 2004, the director observed in the notice of intent to revoke that the record was confusing regarding the petitioner's and the foreign entity's ownership and control. The director also mistakenly stated that when the petition was filed in March 1997, the record showed [REDACTED] owned 75,000 shares of the foreign entity.

In rebuttal, counsel for the petitioner noted that [REDACTED] owned 75,000 of the foreign entity's shares in 1997 and owned 58 percent of the petitioner in 1997. Counsel asserted that the record and evidence clearly show that [REDACTED] maintained control over the two entities in the period when the petition was filed.

The director determined that the record did not show that the two entities are owned and controlled by the same parent or individual, or that the two entities are owned and controlled by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity.

On appeal, counsel for the petitioner claims that the same individual, [REDACTED] owned 50 percent or greater interest in the United States and the foreign entity, and continued to hold this interest in 1998.

When the petition was filed on March 20, 1997, the record establishes that [REDACTED] owned 25,000 shares in the foreign entity. [REDACTED] did not receive an additional 50,000 shares until April 2, 1997, after the petition had been filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The record does not establish that the ownership of 25,000 shares was sufficient to control the foreign entity at the time of filing the petition. The petitioner did not document the total number of shares issued by the foreign entity as of March 20, 1997. The AAO notes, however, that [REDACTED] received 25,000 shares numbered 50,001 to 75,000 on December 4, 1996. Thus, the record suggests that he owned, at most, one third of the foreign entity's shares at the time the Form I-140 was filed.

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.

Beyond the decision of the director, the petitioner has not established that the beneficiary's position for the U.S. entity will be primarily managerial or executive. The petitioner has submitted an organizational chart showing that the beneficiary will supervise an assistant general manager, a product manager, and an office manager and will co-supervise an individual in customer service. The petitioner has also provided a general description of the beneficiary's duties that paraphrases portions of the definitions of executive and managerial capacity. The AAO acknowledges that the petitioner purports to employ over 250 employees; however, the lack of detail regarding the beneficiary's duties and the apparently incomplete organizational chart do not support a conclusion that the beneficiary's duties are or will be primarily managerial or executive. For this additional reason, the petitioner has not established 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).

Of note, the beneficiary's new job and the portability considerations of AC21 are separate issues that must be addressed in the adjudication of the beneficiary's I-485 application, not in the I-140 revocation decision. No appeal lies from the denial of an application for adjustment of status under section 245 of the Act, 8 C.F.R. § 245.2(a)(5)(ii), however the AAO observes that for the portability provisions to apply, the underlying petition must be "valid" to begin with if it is to "*remain* valid with respect to a new job." Section 204(j) of the Act, 8 U.S.C. § 1154(j) (emphasis added). In this matter, the record does not establish the beneficiary's initial eligibility for this visa classification.

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.