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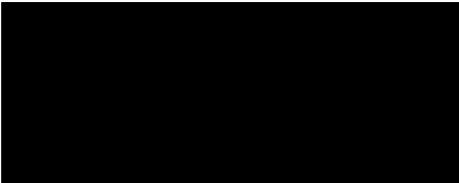
Office: CALIFORNIA SERVICE CENTER

Date: JUN 27 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

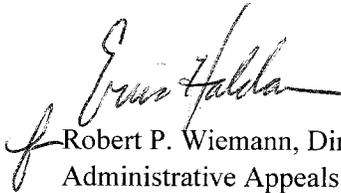
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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 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 avers it is a corporation organized in the State of California in July 1996. It operates a juice bar and health food restaurant. The petitioner 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.

On March 22, 2004, the director issued a notice of intent to revoke approval of the petition. The director determined that the petitioner had not established: (1) that the beneficiary had been employed with a qualifying organization in one of the three years prior to filing the petition in a managerial or executive capacity; (2) that the beneficiary would be employed in a managerial or executive capacity for the United States entity; or (3) a qualifying relationship with the beneficiary's foreign employer. The director noted that good and sufficient cause existed to revoke the petition and afforded the petitioner 30 days to offer evidence in support of the petition and in opposition to the proposed revocation.

In an April 21, 2004 rebuttal, counsel for the petitioner asserted that the beneficiary had established the foreign entity as a sole proprietorship and was the majority shareholder of the United States "branch." Counsel submitted a statement indicating the beneficiary had paid for his 1,500 shares of the petitioner's stock with funds owned him from another individual. Counsel also submitted the petitioner's U.S. organizational chart for 1997 and 1998 with job descriptions for the beneficiary's position as president, for a vice-president, and part-time employees in the positions of cook, server, dishwasher, and cleaner. Counsel also submitted an organizational chart for the foreign entity showing the beneficiary in the position of proprietor/general manager and individuals in the positions of sales manager, sales representative, and deliveryman.

On September 17, 2004, the director issued his revocation decision, observing that the documentation submitted in rebuttal to Citizenship and Immigration Services (CIS) notice of intent to revoke did not overcome the grounds for revocation on the issue of the beneficiary's managerial or executive capacity for the United States entity and the issue of the petitioner's qualifying relationship with the foreign entity.

On appeal, counsel 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 asserts that sufficient evidence has been submitted establishing a qualifying relationship and establishing that the beneficiary functions as a manager or executive.

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).

Counsel's assertion on appeal 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 is not relevant to the matter at hand. 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.

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) 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)).

In this matter, the director raised three separate issues in the notice of intent to revoke, based on the eligibility requirements set by the applicable statute and regulations. *See generally*, section 203(b)(1)(C) of the Act; 8 C.F.R. § 204.5(j).

On revocation, the director determined that the petitioner had not established a qualifying relationship with the beneficiary's foreign employer. The director noted that the beneficiary was the sole proprietor of the foreign entity. The director questioned the beneficiary's ability to control the foreign entity once in the United States. The director also determined that the petitioner had not provided evidence that the foreign entity capitalized the petitioner. The director concluded that the petitioner, although incorporated, appeared to operate only as a vehicle to continue the beneficiary's self-employment in the United States.

On appeal, counsel for the petitioner asserts that the beneficiary as the sole proprietor of the foreign entity owned and controlled the foreign entity and also held a majority interest in the petitioner. Counsel acknowledged in rebuttal that the foreign entity had ceased operations in 1999 but referenced past Service policy¹ to not deny adjustment of status solely because the overseas subsidiary or affiliate ceased operations

¹ Counsel did not submit copies of the letters cited in support of this assertion. Moreover, the two letters from: (1) Odom, Chief, Advisory Opinions Division (November 17, 1992), and (2) LaFleur, Chief, Business and Trade Services Branch, INS (July 15, 1996) appear to be letters written regarding specific matters. These

after the Form I-140 was approved but prior to the adjustment of status interview, absent revocation of the Form I-140 petition. Counsel asserts that the CIS assumption that the beneficiary did not control the foreign entity because he was physically in the United States is speculative and not substantiated in the record.

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.

Counsel's assertions are not persuasive. The regulations require that the qualifying entity, or its affiliate, or subsidiary, conduct business in two or more countries, one of which is the United States. The petitioner, through counsel, acknowledges that the foreign entity ceased operations in 1999. At that point in time, the petitioner was no longer a multinational company. Counsel argues, that absent revocation of the Form I-140 petition, CIS policy has allowed a beneficiary to adjust status even though the petitioner has lost its multinational status. However, this proceeding regards the revocation of the approval of the Form I-140 petition not the adjudication of the Form I-485, Application to Register Permanent Residence or Adjust Status.

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

letters are not binding on the AAO. Further, neither a letter speaking to a specific matter, nor a policy memorandum supercedes the statute or regulations.

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, when reviewing the record of this proceeding, the nature of the foreign entity and the claimed method of the petitioner's capitalization casts doubt on the actual multinational aspect of the petitioner. The cessation of operations of the foreign sole proprietorship shortly after the erroneous approval of the petitioner's Form I-140 petition also undermines the multinational relationship between the two entities. In this matter, the AAO agrees with the director that the record suggests that the petitioner was created to operate as a vehicle to transfer the beneficiary to the United States to continue his self-employment.

The AAO notes that 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. 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 beneficiary allegedly purchased 1,500 shares of the petitioner with money owed him from another individual. The only document supporting this transaction is a related individual's unsworn statement that money owed to the beneficiary was being paid for the beneficiary's "buying the [redacted] on 10/14/1996 and the purchase [of] 1500 common shares of [the petitioner's] stock." The petitioner also provides the petitioner's minutes dated October 8, 1996 stating that 1500 shares of the petitioner's stock is being issued to the beneficiary for the consideration of \$1,500 and 500 shares is being issued to [redacted] for the consideration of \$500. The petitioner's 1999, 2000, and 2001 Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, on Schedule L, Line 22(b) value the petitioner's stock at \$11,510. The petitioner does not explain the discrepancy in the stock value and the claimed purchase price of the stock. 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).

Finally, the record is insufficient to establish that the beneficiary's foreign sole proprietorship was sufficiently established to continue operations once the beneficiary transferred to the United States. Although the foreign sole proprietorship continued operations for a short time after this Form I-140 was filed and approved, the subsequent cessation of operations terminated the petitioner's multinational classification. The record does not substantiate that the beneficiary is a *multinational* manager or executive or that the beneficiary seeks to enter the United States in order to continue to render services to the same employer, subsidiary, or affiliate of the beneficiary's foreign sole proprietorship.

Also on revocation, the director determined that the petitioner had not established that the beneficiary's position would be primarily managerial or executive. The director noted that the petitioner's organizational chart: depicted the beneficiary as president and as responsible for the overall operations of the health food restaurant and juice bar; depicted a vice-president who handled money and took inventory, planned and conducted company meetings, performed duties delegated by the president, and participated and oversaw cooking and deciding the menu; depicted several² part-time employees responsible for cooking, serving, dishwashing, and cleaning. The director referenced the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Return, that showed minimal amounts expended by the petitioner for the cost of labor. The director concluded that the petitioner had established that it had only one employee, the beneficiary, and had not established that the beneficiary's assignment was primarily managerial or executive.

On appeal, counsel for the petitioner contends that the director focused on the petitioner's number of employees and the salaries paid when determining that the beneficiary's position was not managerial or executive and failed to consider the reasonable needs of the company when making his determination.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

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). In this matter, the petitioner's description of the beneficiary's duties indicates that the beneficiary purchases food, estimates cost of food, requisitions supplies, selects and plans menus, oversees the staff and staffing functions, including hiring and firing and directing payroll, interacts with customers and vendors, establishes standard for service to customers, and resolves customer complaints. The actual duties themselves 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). The majority of the beneficiary's duties are routine tasks associated with the day-to-day operation of a restaurant. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. See section 101(a)(44)(A)(iv) of the Act.

In addition, the petitioner's organizational charts depict the beneficiary as a first-line supervisor. The position of vice-president and the part-time cooks, servers, and cleaners are directly subordinate to the beneficiary's position. Further, the petitioner does not provide job descriptions that substantiate that the individuals in

² The petitioner's organizational chart for 1997 depicted five part-time employees; the petitioner's organizational chart for 1998 depicted two part-time employees.

these positions perform duties that relieve the beneficiary from primarily performing operational tasks and first-line supervisory duties. The record does not support a claim that the vice-president, or the part-time cooks, servers, and cleaners are professional, managerial, or supervisory employees.

To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. 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).

Beyond the decision of the director, the petitioner also has not established that the beneficiary's duties for the foreign entity constituted primarily managerial or executive duties. The petitioner's description of the beneficiary's duties for the foreign entity, again describe an individual performing operational tasks. Further, the petitioner's organizational chart shows that the beneficiary holds a first-line supervisory role. The petitioner does not provide descriptions of the beneficiary's subordinates' duties that would elevate their sales and delivery roles to that of professional positions.

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). For this additional reason, the petitioner has not established the beneficiary's eligibility for this visa classification.

The record does not contain evidence that the beneficiary qualifies for this visa classification. Based on the record of proceeding, the director's initial approval of this petition was contrary to the statute and plainly in error. Here, the petitioner failed to offer sufficient evidence in explanation or rebuttal to overcome the issues raised in the director's notice of revocation and the additional issue noted in the notice of intent to revoke and identified on appeal. The director's decision will be affirmed.

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.