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U.S. Citizenship
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Services

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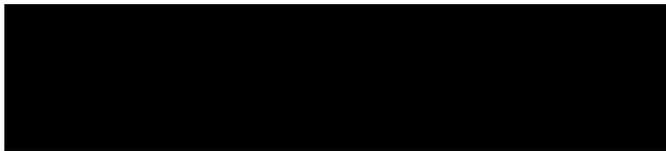
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **NOV 23 2005**
WAC 97 073 52196

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

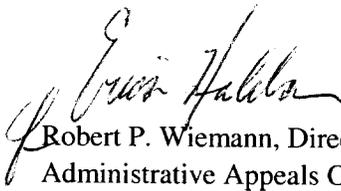
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, approved the employment-based petition. Following an investigation performed in connection with the beneficiary's I-485 Application to Adjust Status, the director issued a Notice of Intent to Revoke and subsequently revoked approval of the petition. The director certified the instant matter to the Administrative Appeals Office (AAO) for review. The AAO will affirm the director's decision to revoke the approval of the petition.

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of California that is engaged in the international trade of fabric scraps. The petitioner seeks to employ the beneficiary as its president-general manager.

The director approved the petition on February 8, 1997. The director subsequently issued a Notice of Intent to Revoke providing the petitioner thirty days during which to rebut the proposed revocation. On January 5, 2005, the director revoked approval of the petition concluding that the petitioner had not demonstrated the existence of a qualifying relationship between the petitioning entity and the foreign organization or that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. On that same date, the director certified the instant matter to the AAO. Citizenship and Immigration Services (CIS) records indicate that the director mailed a notice of certification to the petitioner, which indicated that the petitioner had thirty days during which to submit a brief to the AAO. The petitioner did not submit additional documentation. Therefore, the record will be considered complete.¹

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.

¹ The record contains a Motion to Reopen and Reconsider filed by counsel on January 4, 2005 in connection with the denial of the beneficiary's Form I-485 application. It appears that the beneficiary's I-485 was prematurely denied prior to the adjudication of the underlying I-140 petition. While the record contains a brief in connection with the beneficiary's I-485, the petitioner did not submit additional documentation in support of the instant certification. The petitioner's brief submitted on motion addresses only the issue of the denial of the beneficiary's I-495 application and does not include evidence which would be relevant to the instant matter.

The language of the statute is specific in limiting this provision to only those executives or 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, 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.

Following approval of an immigrant or nonimmigrant petition, the director may revoke approval of the petition in accordance with the statute and regulations. 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."

Regarding "good and sufficient cause" and the revocation 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 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)).

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. at 590. Notwithstanding the CIS burden to show "good and sufficient cause" in proceedings to revoke 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 Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

The AAO will first address the issue of whether the petitioner established a qualifying relationship between the foreign and United States entities.

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;

* * *

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.

The petitioner filed the instant petition on January 17, 1997. In an accompanying letter, dated January 15, 1997, the petitioner referenced the foreign entity as its parent company, stating that the foreign entity owned 100 percent of its 1,000 issued shares of stock and exercised managerial control over the United States corporation. As evidence of stock ownership, the petitioner provided its articles of incorporation, Notice of Transaction Pursuant to California Corporations Code Section 25102(f), minutes from a June 8, 1994 organizational meeting, and a June 6, 1994 stock certificate identifying [REDACTED] as the owner of 1,000 shares of stock. The petitioner also submitted Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, for the year 1995, which identified [REDACTED] as the sole shareholder of the organization.

The director issued a Notice of Intent to Revoke on December 2, 2002 and January 27, 2003,² referencing an overseas investigation performed by Immigration and Naturalization Services (now Immigration and Customs Enforcement (ICE)) in connection with the beneficiary's I-485 application. The director explained that the owner of the foreign entity, [REDACTED] indicated during the investigation that "the beneficiary [had] asked him to send a copy of his company registration to the beneficiary for incorporat[ing] the petitioner with 50% of an investment capital of US\$100,000.00," yet denied furnishing the requested funds. The director further stated that [REDACTED] acknowledged only a buyer-seller relationship with the United States company, noting that [REDACTED] has never visited the United States organization and did not know how many workers the petitioner employed.

In a response filed on February 13, 2003, the petitioner challenges the director's finding, stating that the beneficiary's immigration status "should not be revoked due to an interview with one disgruntled boss." The petitioner stated:

As can be seen from the Articles of Incorporation (exhibit D), the US branch was incorporated in 1994, with 1,000 shares of stock available for purchase. The president of the corporation, [REDACTED] was the sole shareholder and owned all 1,000 shares. In 1998, the beneficiary purchased 50 of [REDACTED] shares. (Exhibit F). Later that year, the beneficiary had a dispute with [REDACTED] about management style and strategy. [REDACTED] then told the beneficiary that he would not help the beneficiary obtain legal status in the United States, and has since then attempted to sabotage the beneficiary's status.

² The director indicated in his January 5, 2005 decision that CIS did not receive a response to the first Notice of Intent to Revoke and therefore mailed a second Notice to the petitioner.

The petitioner references the additional stock certificates submitted with its response as evidence of the purported stock ownership by the beneficiary and [REDACTED]. The petitioner also submitted two incoming wire transfer notifications, dated July 18, 1994 and September 26, 1994, and a May 10, 1994 "Customer Receipt" reflecting a cumulative transfer of \$45,000 to the beneficiary. An accompanying bank statement confirmed a May 10, 1994 deposit of \$14,988 into the beneficiary's savings account.

In a decision dated January 5, 2005, the director revoked approval of the petition. The director addressed the above-noted allegations made by [REDACTED] also noting that [REDACTED] has no documentation of the purported transfer of funds to the United States entity. The director noted that a relevant factor in determining the existence of a qualifying relationship is the foreign entity's claim that it "[has] nothing to do with the petitioner." The director also considered the documentary evidence submitted by the petitioner, particularly the stock certificates, 1997 corporate tax return, California Notice of Transactions, and wire transfer receipts. The director concluded that the documentation indicated that [REDACTED] and not the foreign entity, as claimed by the petitioner, owned the petitioning entity. Consequently, the director revoked approval of the petition based on the petitioner's failure to establish a qualifying relationship between the two entities.

Upon review, the petitioner has not established the existence of a qualifying relationship between the United States and foreign entities.

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.

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 364-365. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

As properly noted by the director, the AAO will consider the present issue based on the evidence provided at the time of filing the petition. 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). In addition, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The AAO recognizes that [REDACTED] is the sole proprietor of the foreign entity. However, the record does not contain sufficient independent and objective evidence of the purported parent-subsidary relationship. As emphasized by the director in his Notice of Intent to Revoke, the petitioner has not demonstrated ownership of the petitioning entity by [REDACTED] or similarly, by the foreign entity.³ Relevant evidence of ownership would include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest. Here, although the record contains two wire transfer receipts for funds issued by the foreign company, the receipts identify the beneficiary as the recipient of the monies, rather than the petitioning entity. There is insufficient evidence that the petitioner received the transferred funds in exchange for [REDACTED] purported stock ownership. This is particularly relevant in light of [REDACTED] denial of having an ownership interest in the petitioner. 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)). Absent additional independent and objective evidence, the AAO cannot conclude that a parent-subsidary relationship exists between the foreign and United States entities. Accordingly, the director properly revoked approval of the employment-based petition.

The AAO will next consider the issue of whether the petitioner established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

³ As the sole proprietor of the foreign entity, [REDACTED] and the foreign corporation are considered to be the same for legal purposes.

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.

On the immigrant petition, the petitioner noted the employment of seven employees, including the proposed employment of the beneficiary as its president-general manager. In an attached letter, dated January 15, 1997, the petitioner stated that in this position, the beneficiary would "be responsible for directing and managing overall operations of the US subsidiary," including such job duties as: (1) setting company policies and ensuring their implementation; (2) negotiating business transactions; (3) researching the American market; (4) making decisions pertaining to personnel; and (5) coordinating transactions between the foreign and United States entities. The petitioner noted that the beneficiary would receive an annual salary of \$42,000.

In the appended documentation, the petitioner provided its organization chart, on which it identified the positions subordinate to the beneficiary as: secretary, sales manager and supervisor, freight and trucking coordinator, bale men, and fabric sorter and warehouse man. An attached quarterly wage report for the quarter ending December 1996 confirmed the employment of the seven workers identified on the organizational chart.

In his January 27, 2003 Notice of Intent to Revoke, the director stated that the petitioner's "general and vague" description of the beneficiary's job duties fails "to convey any understanding of exactly what the beneficiary will be doing on a daily basis." The director noted that absent "elaboration and clarification" of the job duties, CIS could not conclude that the beneficiary would exercise managerial or executive job responsibilities, nor could it decide that the beneficiary would be primarily employed in a qualifying capacity. The director requested that the petitioner provide the beneficiary's 1996 payroll records, and its federal income tax returns and quarterly wage reports from 1998 through the date of the notice.

In a letter dated February 12, 2003, the petitioner contended that in his positions of "executive" and "officer" of the United States corporation, the beneficiary is responsible for establishing and running the organization. The petitioner stated:

The beneficiary contacts, inspects, negotiates with and supervises the transactions with manufacturing companies in [cotton milling plants, fabric coloring dye houses, and garment factories]. He communicates with the parent company to update and exchange information on value and demand for the fabric. He arranges shipment of the fabric to the parent

company in Hong Kong. The beneficiary looks for overseas buyers and fabric suppliers. He maintains the daily operations of the business, including hiring and firing of the employees.

In support of the beneficiary's employment in both an executive and managerial capacity, the petitioner claimed:

The beneficiary handles the hiring and termination of all employees, as well as the management of all day to day policies. He is solely in charge of the subsidiary, so he has great discretion in his decision making, and has loose supervision from Hong Kong. The beneficiary clearly, therefore, qualifies as an executive.

* * *

As detailed above, the beneficiary is solely in charge of the day-to-day decisions at [the petitioning entity] and handles the hiring and termination of all employees. The beneficiary also qualifies as a manager.

The petitioner submitted the requested federal tax returns and quarterly wage reports, and explained that it could not obtain the beneficiary's payroll records from the foreign entity, due to the records not being "strictly maintained" and the "deteriorated relationship between the beneficiary and his boss."

The director concluded in his January 5, 2005 Notice of Revocation that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director stated that despite the beneficiary's title, he would not be employed as either a manager or an executive. Following a review of the petitioner's organizational chart, the director noted that "[i]t would be unreasonable to believe that the beneficiary as President/General Manager, with the organizational structure provided, would not be assisting with the day to day non-supervisory duties." The director further noted that the petitioner had not demonstrated that the beneficiary's subordinate workers qualify as professionals, or that the beneficiary would be employed as a function manager.

Upon review, the petitioner has not demonstrated that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

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). Here, a portion of the beneficiary's job duties is simply a restatement of the responsibilities outlined in the statutory definitions of "managerial capacity" and "executive capacity." *See* §§ 101(a)(44)(A) and (B) of the Act. It is not sufficient to merely state that the beneficiary hires and fires employees, creates corporate goals and policies, functions with "loose supervision," and makes day-to-day decisions. 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).

Additionally, the petitioner's vague and limited job descriptions fail to identify the specific job duties the beneficiary would perform on a daily basis. The petitioner has not explained the corporate policies created by the beneficiary, nor defined the "works" the beneficiary is responsible for coordinating between the foreign

and United States companies. Moreover, the petitioner has not explained how the beneficiary's participation in "major business transactions," a job duty that may often be considered non-managerial or non-executive, qualifies him as a manager or executive. 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. at 1108.

Furthermore, based on the petitioner's representations in its February 12, 2003 response, the beneficiary would be performing many non-qualifying functions of the corporation. Specifically, the beneficiary is personally responsible for the petitioner's sales, as he would negotiate with the petitioner's suppliers and locate overseas buyers and fabric suppliers. In addition, because the beneficiary is responsible for coordinating overseas shipments to the foreign entity, he is personally performing a portion of the petitioner's freight forwarding functions. The AAO notes that this responsibility conflicts with the job duties of the petitioner's "freight and trucking coordinator." 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). Also, with regard to the overlap in job duties by the beneficiary and freight coordinator, the petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO further notes a discrepancy on the beneficiary's resume submitted by the petitioner in support of the beneficiary's qualification as a manager or executive. Upon review of the resume, it is evident that the title, "general manager," was not part of the original document. While this discrepancy, by itself, does not indicate that the beneficiary is not employed in the purported capacity, it undermines the petitioner's credibility. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Based on the foregoing discussion, the petitioner failed to establish that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the director's revocation of approval of the petition was properly based on "good and sufficient" cause.

Beyond the decision of the director, an additional issue is whether the petitioner demonstrated that the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity as required in the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B). The petitioner noted in its January 15, 1997 letter that prior to his transfer to the United States entity, the beneficiary worked abroad in the position of general manager, which included such responsibilities as: (1) supervising the company's administrative functions; (2) obtaining and negotiating "buying/selling" contracts; (3) hiring, firing, training, and reviewing the employees' performances; and (4) assigning personnel to the appropriate positions in the company. The record does not contain an additional description of the beneficiary's job duties. The petitioner's limited statement does not outline the specific managerial and executive job duties performed by the beneficiary on a daily basis. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Additionally, based on the brief job description submitted by the petitioner, it appears that the beneficiary was responsible for personally performing at least a portion of the foreign entity's sales. As the petitioner did not provide documentary evidence of any lower-level employees supervised by the beneficiary, the AAO cannot conclude that the beneficiary was relieved from performing the non-qualifying functions of

the foreign company. Again, 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. at 604. Consequently, the petition is denied for this additional reason.

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 approval will be revoked 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 director's decision of January 5, 2005 is affirmed. The approval of the petition is revoked.