

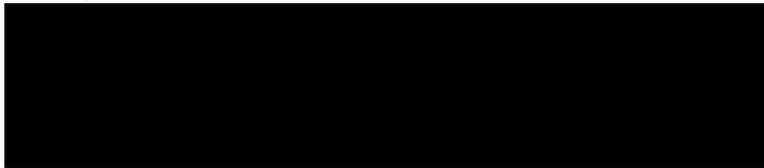
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U.S. Department of Homeland Security
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U.S. Citizenship
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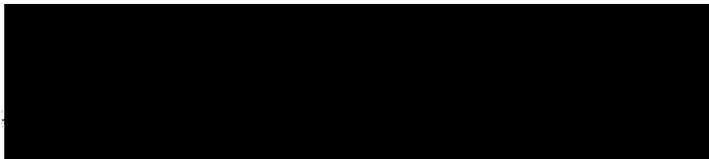
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: SEP 29 2005
WAC 96 132 54014

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 petition. Following an interview and investigation performed in connection with the beneficiary's Form I-485 Application to Adjust Status, the director issued a Notice of Intent to Revoke and properly provided the petitioner thirty days during which to rebut the proposed revocation. The director subsequently revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed the instant immigrant petition seeking 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 import, export and investment activities. The petitioner seeks to employ the beneficiary as its vice-president.

The director approved the employment-based petition on May 16, 1996. On November 15, 2004, the director issued a Notice of Intent to Revoke as a result of information obtained in connection with the beneficiary's I-485 application. Counsel for the petitioner responded in a letter dated December 28, 2004, claiming that pursuant to *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d 127 (2d Cir. 2004), Citizenship and Immigration Services (CIS) is prohibited from revoking approval of the instant petition. Counsel also contended that it would be "unfair" for CIS to revoke approval of the petition, which was approved eight years prior to the director's issued Notice. Counsel further claimed that CIS has not satisfied the statutory requirement of demonstrating "good cause" in order to revoke approval of the petition.

On February 10, 2005, the director revoked approval of the employment-based petition based on the petitioner's failure to demonstrate that: (1) it had been doing business for at least one year prior to filing the immigrant petition; (2) the beneficiary had been employed abroad and would be employed by the United States entity in a primarily managerial or executive capacity; (3) a qualifying relationship exists between the foreign and United States organizations; and (4) it had the ability to pay the beneficiary's proffered annual salary.

Counsel properly filed an appeal on March 22, 2005¹, again claiming that *Firstland* bars the revocation. Counsel contends that the revocation of approval of the petition is unfair, noting that because the foreign entity no longer exists, the beneficiary cannot obtain the necessary documents. Counsel submits a brief in support of the appeal.

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):

* * *

¹ The AAO notes that the February 10, 2005 decision was returned to CIS as undeliverable to the address of the petitioning entity. The decision was subsequently mailed to the beneficiary on March 4, 2005. The petitioner filed a timely appeal on March 22, 2005.

(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 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 unrebutted, 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 counsel's reference on appeal 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.²

According to CIS records, the petitioner is located in California; thus, this case did not arise in the Second Circuit. *Firstland* was never a binding precedent for this case. 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, 118 Stat. 3638 (2004). Specifically relating to this matter, section 5304(c) of Public Law 108-458 amends section 205 of the Act by striking "Attorney General" and inserting "Secretary of Homeland Security" and by striking the final two sentences. Section 205 of the Act now reads:

The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition.

Furthermore, section 5304(d) of Public Law 108-458 provides that the amendment made by section 5304(c) took effect on the date of enactment and that the amended version of section 205 applies to revocations under section 205 of the Act made before, on, or after such date. Accordingly, the amended statute specifically applies to the present matter and counsel's *Firstland* argument no longer has merit.

The AAO will next consider the merits of the instant matter. Counsel does not specifically address on appeal each of the director's findings. Rather, counsel notes the passing of eight years from the date the I-140 immigrant petition was approved and the time the approval of the petition was revoked, and contends that it would be unfair to require the petitioner to submit documents from April 1996. Counsel notes an increased difficulty in obtaining the necessary documentation, as the foreign company no longer exists. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N

² 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 B-1 in June 30, 1995, nine months prior to the filing of the Form I-140 immigrant petition and ten 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.

Dec. 503, 506 (BIA 1980). As counsel has not provided on appeal any documentary evidence pertaining to the beneficiary's employment capacity both abroad and in the United States, the operations performed by the petitioning entity, as well as its ability to pay the beneficiary the proffered annual salary, the petitioner has failed to demonstrate its eligibility for the immigrant visa. Absent evidence by the petitioner establishing otherwise, the director's revocation of approval of the petition was based on good and sufficient cause.

The AAO will next consider the issue of whether a qualifying relationship exists 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.

On appeal, counsel acknowledges that the foreign Chinese company no longer exists. CIS regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed. 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." As in the present petition, filed pursuant to Section 203(b)(1)(C) of the Act, if the director determines that a qualifying relationship between the foreign and United States entities no longer exists the director may issue a notice of intent to revoke and request additional evidence. The director properly noted in his Notice of Intent to Revoke discrepancies in the location and business operations of the purported foreign company. The director also requested that the petitioner submit documentation regarding consideration furnished by the foreign entity in exchange for its claimed stock ownership in the petitioning corporation. This information is essential to establishing the existence of the foreign corporation, and likewise, assists in demonstrating a qualifying relationship between the foreign and United States entities. As counsel has conceded that there is no longer a foreign entity, the petitioner is not eligible for the immigrant classification sought. *See* 8 C.F.R. § 204.5(j)(2) (defining the term "*multinational*" as a qualifying entity, affiliate, or subsidiary, which conducts business in the United States and at least one other country). Accordingly, approval of the petition was properly revoked, and the subsequent appeal will be dismissed.

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. Accordingly, the director's decision to revoke approval of the petition will be affirmed and the appeal will be dismissed.

ORDER: The appeal is dismissed.