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U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship
and Immigration
Services

B4

[redacted]

FILE: SRC 99 270 53746 [redacted] Office: TEXAS SERVICE CENTER Date: JUL 03 2008

IN RE: Petitioner:
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:

[redacted]

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, Chief
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Texas Service Center. After serving a notice of intent to revoke, the director revoked the approval of the petition on December 16, 2004. The petition was reopened on February 16, 2007 on a service motion, and a notice of intent to revoke was mailed to the petitioner on February 16, 2007. After reviewing the petitioner's response to the notice of intent to revoke, the approval of the petition was again revoked and certified to the AAO for review. The director's decision will be affirmed. The petition approval is revoked.

The petitioner was incorporated on January 13, 2000 in the State of California and states that it is engaged in the import and wholesale of appliances, restaurant equipment, rice cookers, vacuum bottles, air pots, and other general merchandise. It seeks to employ the beneficiary as its 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 initial petition was approved on January 14, 2002. After the petitioner's failure to respond to a notice of intent to revoke mailed on November 5, 2004, the director revoked the approval of petition on December 16, 2004. The petition was reopened on February 16, 2007 by service motion, and a notice of intent to revoke was mailed to the petitioner on February 16, 2007. After reviewing the petitioner's response to the notice of intent to revoke, received on March 19, 2007, the petition approval was again revoked based on the following conclusions: (1) the petitioner was not doing business in the United States as defined by the regulations; (2) the beneficiary would not be employed in a managerial or executive capacity; and (3) a qualifying relationship did not exist between the petitioner and the foreign entity.

The decision was certified to the AAO for review on April 13, 2007, and although the petitioner was notified of its right to submit a brief or written statement within 30 days, no documentation has been received. Accordingly, the record will be considered complete.

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 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 450 (BIA 1987)).

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). If the petitioner of an approved visa petition was ineligible or 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).

As previously indicated, the petitioner in this matter endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. Specifically, 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).

The first issue in this matter is whether the petitioner established that it has been doing business in the United States as required by the regulations. The regulation at 8 C.F.R.§ 204(j)(2) defines "doing business" as "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

The petitioner claims to be an import and export company. Subsequent to the approval of the petition, additional information was received during the course of the beneficiary's adjustment interview at the

Houston District Office. Specifically, the beneficiary indicated that the petitioner's U.S. enterprise did not use Customs Forms 7501 and 301 for its business, despite its claims to be an import and export company. According to 19 C.F.R. § 144.12, 13, and 14, all merchandise traveling to or from the United States is required to go through customs.

Based on these statements, a notice of intent to revoke was forwarded to the petitioner. The petitioner was asked to submit documentary evidence definitively establishing that it was engaged in the business dealings it claimed in the petition. Specifically, the director requested documentation in the form of an import/export license, a contract or agreement between the petitioner and any company providing the necessary shipping and/or receiving services, and evidence that the petitioner was systematically and regularly conducting business within the United States. In response, the petitioner submitted an opinion letter from Mr. Jay Acayan, an attorney specializing in the field of customs regulations, which claimed that although the petitioner did in fact use those forms when they were required, the petitioner is no longer required to do so and therefore is not violating customs procedures. In the response, counsel also claimed that the petitioner did not maintain a warehouse in the United States because it merely traded goods, i.e., bought goods from one country and shipped them to another. Finally, copies of the petitioner's income tax returns, purchase invoices, and shipping documents, from 2002 to the present, were submitted.

The director was not persuaded by the evidence and explanations offered in response to the notice of intent to revoke. Specifically, the director noted that importing goods required the physical acceptance of and/or responsibility for goods that enter the United States. The director further noted that according to Mr. Acayan's letter, as well as counsel's claims, the petitioner was not the importer of goods, but could be if it chose to. Based on this statement, and the lack of evidence to show that the petitioner was actually importing goods into the United States from another country, the director revoked the approval of the petition.

Upon review, the AAO concurs with the director's findings. As stated in the beginning of this decision, the initial petition presents crucial evidence with regard to determining the petitioner's eligibility for the benefit sought. On the Form I-140, the petitioner clearly stated that it was engaged in import and export services. Therefore, the director properly revoked the petition after determining that the evidence did not contain sufficient evidence to support a finding that the petitioner was still engaged in the business which it claimed to perform.

In the course of examining whether a petitioning company has been doing business as an import and export firm, it is reasonable to request that the company produce copies of documents that are required in the daily operation of the enterprise due to routine regulatory oversight. Upon the importation of goods into the United States, the Customs Form 7501, Entry Summary, serves to classify the goods under the Harmonized Tariff Schedules of the United States and to ascertain customs duties and taxes. The Customs Form 301, Customs Bond, serves to secure the payment of import duties and taxes upon entry of the goods into the United States. According to 19 C.F.R. § 144.12, the Customs Form 7501 shall show the value, classification, and rate of duty for the imported goods as approved by the port director at the time the entry summary is filed. The regulation at 19 C.F.R. § 144.13 states that the Customs Form 301

will be filed in the amount required by the port director to support the entry documentation. Although customs brokers or agents are frequently utilized in the import process, the ultimate consignee should have access to these forms since they are liable for all import duties and taxes. Any company that is doing business through the regular, systematic, and continuous provision of goods through importation may reasonably be expected to submit copies of these forms to show that they are doing business as an import firm.

The AAO notes that the petitioner claims it no longer is required to complete these forms. However, it appears that the ultimate reason that the petitioner does not complete these forms is because it is not actually importing goods into the United States. The petitioner's initial letter of support, dated July 31, 1999, claims that the foreign entity exported goods from Taiwan into the United States by utilizing the services of a U.S. corporation, Metro Thebe, Inc., which served as its agent. As a result of the foreign entity's European clients expanding into the United States, the petitioner was created to, presumably, eliminate Metro Thebe, Inc. as the middle man. The record clearly indicates, based on the statements of the petitioner and the documentation submitted, that the U.S. petitioner merely operates as an agent for the foreign entity in the United States, and not as a valid importer of goods as it claims in the initial petition. Furthermore, the documentation submitted is insufficient to establish that the petitioner has been engaged in regular and systematic business dealings.

Although not addressed in detail by the director, an exorbitant amount of documentation in the form of invoices, packing lists, and bills of lading has been submitted in support of the contention that the petitioner has been doing business,. Despite the abundance of documentation, this evidence is insufficient to establish that the petitioner has been doing business as required by the regulations. First, a large amount of this documentation is in Chinese and is not accompanied by a certified translation. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, this evidence is not probative and will not be accorded any weight in this proceeding.

Additionally, many of the English documents provided confirm that the foreign entity was still utilizing the services of Metro Thebe, Inc. after the petition's initial approval. More importantly, the vast number of documents submitted fail to show who actually receives the goods at the ports of entry. Many of the documents merely demonstrate the shipping of various goods from China to European destinations such as Hamburg and Antwerp. The U.S. petitioner appears in name only as the person to notify, whereas the foreign entity and Metro Thebe consistently are listed as the shipper or consignee. Finally, despite the fact that the petitioner has submitted bank statements evidencing wire transfers, there is no evidence of money transferred in from U.S. based companies. Therefore, the AAO cannot reconcile the vast number of invoices and purchase orders submitted since there is no evidence of money being exchanged for the goods that are allegedly being shipped to U.S. purchasers. Despite the petitioner's repeated claims that the U.S. entity "simply trades" and thus does not maintain a warehouse in the United States, the documentation submitted fails to corroborate this claim. 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)).

For the reasons detailed above, the director's revocation was proper and his decision will be affirmed. 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.

In the notice of revocation, the director noted two additional bases for revocation not set forth in the notice of intent to revoke.[1] The AAO must also address whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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.

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[1] It is noted that while the director raised only the issue of the petitioner doing business in the notice of intent to revoke, the director ultimately based the revocation on the three issues set forth above. The director's error is harmless because the AAO conducts a de novo review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility as required by the regulation at 8 C.F.R. § 245a.2(d)(6). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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 a July 31, 1999 letter appended to the petition, the petitioner indicated that the beneficiary would serve as president of the U.S. entity. With regard to her proposed duties, the petitioner stated:

> [The beneficiary] presently serves in the position of President for our U.S. subsidiary. As President, [the beneficiary] actively oversees the business operations in Texas at an executive level capacity. [The beneficiary] directly manages the operations of all departments and is responsible for formulating and executing company policies and long range goals. She supervises all personnel, including a Manager, Financial Officer, and Sales Department. In addition, [the beneficiary] is responsible for investigating other business opportunities, negotiating business contracts and developing the market in the U.S. [The beneficiary] exercises discretionary power authority over hiring, firing and other personnel decisions, as well as financial and daily operational decisions, for the company.

In addition, the petitioner submitted copies of its Forms 941 for each quarter of 1999 and the first two quarters of 2000, which demonstrated that the petitioner employed between three to six employees during that period, all of whom, based on the wages paid, were part-time employees. According to the information provided by the beneficiary during her adjustment interview, the beneficiary supervises personnel, namely, an office manager, an accounting officer, and an employee in the sales department. The director concluded that the petitioner's small personnel size, coupled with evidence that these persons were not full-time employees, indicated that the beneficiary would be performing non-qualifying duties herself since the record contained insufficient evidence to establish that the beneficiary could be relieved from non-qualifying duties.

Although not raised as a basis for the revocation of the petition's approval, the petitioner addressed this issue briefly in the response to the notice of intent to revoke. The petitioner stated that by virtue of

serving as the president of the U.S. entity since 1998 (while still abroad), the beneficiary was ideally qualified and met all requirements for the position. In the response dated March 16, 2007, the petitioner stated that "[she] will continue to meet the criteria for "managerial or executive capacity" serving as President of [the petitioner] in the United States since she is in charge of 'direct[ing] the management of the organization or a major component or function of the organization. . .' 8 CFR §204.5(j)(2)."

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. § 214.2(l)(3)(ii). In this case, the petitioner vaguely described the beneficiary's duties and, as evidenced by the sentence quoted above, merely paraphrases the regulatory definitions of managerial and executive capacity. In addition, the descriptions provided fail to explain how the beneficiary's duties will interact with the current staff or the potential hiring of additional employees. Secondly, the description of her duties is vague and not specific enough to clearly establish the beneficiary's role in the company. 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 will 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).

Moreover, numerous duties of the beneficiary, such as "negotiating contracts" and "developing the U.S. market" are not considered managerial or executive tasks. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). Upon review of the record, the AAO agrees with the director's finding on this issue, and finds that the director's revocation was proper and his decision will be affirmed.

The second issue raised by the director in the revocation which was not addressed in the notice of intent to revoke is whether the petitioner and the beneficiary's previous foreign employer maintained a qualifying relationship as of the filing date of the petition. Specifically, the AAO will determine whether the petitioner submitted sufficient evidence to support its claim that it is the subsidiary of the beneficiary's previous foreign employer.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G) defines the term "qualifying organization" as a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a

parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(*3*) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

Additionally, the regulation at 8 C.F.R. § 214.2(l)(1)(ii) provides:

(I) "Parent" means a firm, corporation, or other legal entity which has subsidiaries.

(J) "Branch" means an operating division or office of the same organization housed in a different location.

(K) "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.

(L) "Affiliate" means

(*1*) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(*2*) 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, or

(*3*) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

In this case, the petitioner claimed to be the subsidiary of the foreign entity, whom it claims owned 100% of the petitioner on the date of filing in 1999. While the petitioner submitted copies of a stock certificate dated July 7, 1997 which showed that the petitioner was owned entirely by the foreign entity, the record contains conflicting evidence. Specifically, the petitioner also submitted its Form 1120, U.S Corporation

Income Tax Return for 1999. On a statement supporting Schedule K, the petitioner claims that [redacted] not the foreign entity, owned 100% of the petitioner's stock.

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. at 593; *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 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*, 19 I&N Dec. at 595.

In this matter, the claim on Schedule K of the petitioner's Form 1120 for 1999 directly contradicts the stock certificate and the claims of the petitioner that the foreign entity is its sole owner. 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. at 591-92. 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. Since the petitioner has submitted conflicting evidence regarding the ownership and control of the U.S. entity, the AAO cannot determine the ownership of the U.S. entity and thus cannot determine if a qualifying relationship in fact exists. For this additional reason, the AAO finds that the director's revocation was proper and his decision will be affirmed.

ORDER: The decision of the director is affirmed. The petition approval is revoked.