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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 07 2005
WAC 95 091 51675

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, Director
Administrative Appeals Office

DECISION: The Director, California Service Center, approved the petition for an employment-based visa on April 13, 1995. On February 21, 2003, the director properly issued a Notice of Intent to Revoke, providing the petitioner thirty days within which to rebut the proposed revocation. Following the petitioner's response, the director revoked approval of the petition on October 6, 2004. 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 the import, export, and wholesale of garments and consumer products. The petitioner seeks to employ the beneficiary as its president.

The director approved the petition on April 13, 1995. Following an interview and an investigation performed in connection with the beneficiary's Form I-485, the director issued a Notice of Intent to Revoke approval of the petition. In his notice, dated February 21, 2003, the director noted that a qualifying relationship did not exist between the foreign and United States companies. The director further concluded that the record did not support the claim that the beneficiary would be employed in the United States as a manager or an executive.

The petitioner responded in a letter dated March 12, 2003 explaining that the foreign company no longer exists as a result of filing for bankruptcy. The petitioner claims that if the investigation had been conducted in a timely manner, the beneficiary would qualify for the classification sought as the foreign entity continued doing business for three years after the beneficiary's I-485 interview. The petitioner also explained that with respect to the beneficiary's employment, the beneficiary has been employed in the United States as the petitioner's president. The petitioner noted that following a merger between the petitioning entity and "Elite Entrepreneurs, Inc.," a United States company, the petitioner's employees received wages from Elite Entrepreneurs, while the beneficiary was the sole employee paid by the petitioning organization.

In a decision dated October 6, 2004, the director revoked the approval concluding that the petitioner had not established the existence of a qualifying relationship between the United States and foreign entities.

On appeal, counsel claims that based on the "[p]rinciples of due process [and] fundamental fairness" Citizenship and Immigration Services (CIS) should be barred from revoking approval of the petition. In an attached statement in support of the appeal, counsel states that "[h]ad the investigation been conducted in a timely manner [CIS] would have verified that the qualifying relationship existed at the time the petition was filed." Counsel further asserts that it is "fundamentally unfair" for CIS to revoke approval of a petition that was approved more than ten years ago.

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 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 first issue in this proceeding is whether the petitioner established the existence of a qualifying relationship between the United States and foreign 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 February 14, 1995 and provided stock certificates and a stock transfer ledger in support of the purported "branch" relationship between the foreign and United States entities. As additional evidence of the petitioner's relationship as a branch, the petitioner submitted a letter from the foreign company, dated February 3, 1995, in which the foreign company "confirm[ed]" that it holds 90 percent of the petitioner's issued stock. The petitioner submitted a business license for the foreign company, dated July 28, 1989, demonstrating the existence of the foreign entity as a wholesaler and retailer. The director approved the petition on April 13, 1995.

The director subsequently issued a Notice of Intent to Revoke on February 21, 2003. In his notice, the director addressed the issue of qualifying relationship, stating that there was "good and sufficient cause" to conclude that the claimed branch relationship did not exist between the foreign and United States companies. The director noted the lack of evidence pertaining to the existence of the foreign organization and to the claimed qualifying relationship. The director referenced a January 9, 2002 investigation completed by a United States FSN investigator for the purpose of verifying the existence of the foreign entity and the claimed qualifying relationship[1], as well as the beneficiary's prior employment overseas. The investigator stated:

> This writer conducted a site visit to the parent company on January 3, 2002 in an effort to find out whether [the foreign entity] was in existence or not. This writer went to the place where the company was supposedly located. This writer didn't find any sign board outside the gate and no one was inside. The neighbor informed this writer that the location was a private residence not a company.

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[1] The Investigator notes in her report that the purpose of the investigation was to verify the existence of a *parent-subsidiary relationship* between the United States and foreign entities. The AAO notes that the petitioner had claimed in a letter attached to the immigrant petition that the United States company was a branch office.

The director further noted in her Notice of Intent to Revoke that the record demonstrated that the beneficiary did not qualify as an executive or manager. The director stated:

> [T]he evidence contained in the file in the form of uncertified tax returns and uncertified Form 941's, Employer's Quarterly Federal Tax Returns, for both [the petitioning organization] and Elite Entrepreneurs, Inc. strongly indicate that the [beneficiary] was the only employee of [the petitioning organization] and in the documents submitted in behalf of Elite Entrepreneurs, Inc. the [beneficiary] does not appear at all.

The director stated that the existence of these circumstances themselves, without considering the investigation report, would indicate that the beneficiary does not qualify for the employment-based visa. The director provided the petitioner with thirty days within which to provide a rebuttal to the proposed revocation.

The petitioner responded in a letter dated March 12, 2003, explaining that the foreign company filed for bankruptcy and terminated its business in 1999. The petitioner offered this as an explanation to the investigator's failure to locate the foreign business at the address provided. The petitioner stated that at the time the petition was filed, the foreign organization was located in an apartment complex used for both residential and commercial purposes.

With regards to the petitioner's relationship with the United States company, Elite Entrepreneurs, the petitioner explained that it purchased 60 percent of the stock of Elite Entrepreneurs, yet each company continued to operate separately. The petitioner stated that following the purchase of Elite Entrepreneurs, the beneficiary was the only employee to continue receiving a salary from the petitioning entity. The petitioner explained that "the rest of [the] employees received their salaries from Elite Entrepreneurs, Inc., [so] it is easy to explain why [the beneficiary's] name did not appear in the documents of Elite Entrepreneurs, Inc."

The petitioner requests a "fair decision" from Citizenship and Immigration Services (CIS), claiming that if the investigation associated with the beneficiary's I-485 petition had been timely conducted, CIS would have located the foreign company. The petitioner claimed that the beneficiary "should have qualified for the benefit sought as an Executive/Manager as the parent company did not terminate its business until three years after [the beneficiary's] I485 interview."

In a decision dated October 6, 2004, the director revoked approval of the instant petition. The director questioned the documentary evidence submitted by the petitioner in its March 12, 2003 response, noting that language in the foreign company's brochure "suggest[s]" that the foreign organization is not the parent company of the United States entity. The director also noted that the corporate brochure contains a photograph of a six-story office building. Consequently, the director questions why the foreign company would have had to lease office space in a residential apartment complex. The director concluded:

> [T]he petitioner has not established that the beneficiary qualifies for the classification sought because: the petitioner has not now or in the past shown that there was ever a qualifying relationship between the purported parent and U.S. subsidiary. Further, the petitioner claims that [the] parent company is [sic] out of business in 1999, but even now, the petitioner sent no documentation to establish that relationship ever existed, other than a 1992 brochure, which in and of itself does not show a parent/subsidiary [relationship].

In an appeal filed on October 21, 2004, counsel claims that the director's revocation of approval is "fundamentally unfair." Counsel states that CIS failed to request additional information regarding the existence of the foreign entity during proceedings for the immigrant petition and at the beneficiary's I-485 interview, yet performed an overseas investigation six years after the interview. Counsel claims that "[h]ad the investigation been conducted in a timely manner it would have verified that the qualifying relationship existed at the time the petition was filed." Counsel also claims that had the petitioner's certified tax returns been requested earlier, the petitioner could have obtained the documentation, which is no longer available. Counsel maintains that as a result of CIS' failure to process this matter in a timely manner, it should be estopped from revoking approval.

Upon review, counsel's assertions are not persuasive. The director correctly determined that the petitioner had failed to demonstrate 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., supra.* Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The petitioner has not established that the United States company is a branch of the foreign entity as claimed in its February 3, 1995 letter. Section 203(b)(1)(C) of the Act recognizes that a beneficiary may qualify as a multinational manager or executive if employed in the United States by a branch office of the foreign corporation. When a foreign company establishes a branch in the United States, that branch is bound to the parent company through common ownership and management. A branch that is authorized to do business under United States law becomes, in effect, part of the national industry. *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970).

Probative evidence of a branch office would include the following: a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation; copies IRS Form 941, Employer's Quarterly Federal Tax Return, listing the branch office as the employer; copies of a lease for

office space in the United States; and finally, any state tax forms that demonstrate that the petitioner is a branch office of a foreign entity.

If the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). If the claimed branch is incorporated in the United States, CIS must examine the ownership and control of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer.

Here, the petitioner has provided evidence, including its articles of incorporation and its 1994 corporate tax return, that it is a separate corporation from the foreign entity and therefore, not a branch office. The record, however, does not establish that the petitioning entity is either a subsidiary or an affiliate of the foreign corporation.

The evidence submitted by the petitioner with the immigrant petition suggests that the United States entity is a subsidiary of the foreign corporation. However, the limited documentary evidence fails to support the existence of the qualifying relationship. The petitioner's three stock certificates by themselves are not sufficient to establish that the foreign entity maintains ownership and control of the petitioning organization. *See, e.g.* 8 C.F.R. § 204.5(j)(2) (defining "subsidiary," in part, as 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.") An examination of documentation beyond the stock certificates is both necessary and relevant in establishing the petitioner's claim of a qualifying relationship. The petitioner's stock transfer ledger, the only additional document relevant to the present issue, indicates that neither the foreign entity nor the individual shareholder furnished any consideration in exchange for the purported stock ownership. The issue of consideration is significant to determining whether the foreign entity actually owns the claimed 90,000 shares of stock in the petitioning entity. 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)).

Additionally, the petitioner's 1994 corporate tax return contains information that contradicts the purported ownership interests reflected in the stock certificates and on the stock transfer ledger. The petitioner notes on Schedule K and attached Statement Two of its tax return that the foreign entity owns 80 percent of the corporation. The stock certificate and stock ledger, however, identify the foreign entity as the owner of 90 percent of the petitioner's issued stock. The reference to the foreign entity as an 80 percent shareholder also conflicts with the foreign entity's claim in its February 3, 1995 letter of owning 90 percent of the petitioner's stock. Moreover, Schedule L of the tax return reflects common stock in the amount of $60,000. As previously noted, the petitioner's stock ledger transfer indicates that neither shareholder furnished consideration for the issued stock. 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 addresses counsel's claim that the director's revocation is "fundamentally unfair" based on CIS' failure to perform a more timely investigation of the overseas corporation. The petitioner has not demonstrated any error by the director in conducting his review of the petition. Nor has the petitioner demonstrated any resultant prejudice such as would constitute a due process violation. *See Vides-Vides v.*

INS, 783 F.2d 1463, 1469-70 (9th Cir. 1986); *Nicholas v. INS*, 590 F.2d 802, 809-10 (9th Cir. 1979); *Martin-Mendoza v. INS*, 499 F.2d 918, 922 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975). A review of the record indicates that the director properly applied the statute and regulations to the petitioner's case. 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, the director determined that the petitioner no longer maintains a qualifying relationship with a foreign entity and issued a notice of intent to revoke. As the petitioner conceded that the foreign entity no longer exists, the director's subsequent revocation of approval was properly based on good and sufficient cause. Accordingly, the petitioner's claim is without merit.

Based on the foregoing discussion, the director correctly concluded that the petitioner had failed to establish the existence of a qualifying relationship between the United States and foreign entities and properly revoked the approval. Accordingly, the appeal must be dismissed and the petition may not be approved.

The director suggests in his Notice of Intent to Revoke that the beneficiary was not primarily employed in the United States as an executive or manager, and therefore, would not be eligible for the immigrant visa based on this conclusion alone. While the petitioner's March 12, 2003 response addresses the director's conclusion that the beneficiary was the sole employee of the United States organization, the petitioner does not offer any additional evidence that the beneficiary was, in fact, employed in a primarily managerial or executive capacity. 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. Generally, the director's decision to revoke the approval of a petition will be affirmed 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). For this additional reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner did not demonstrate that at the time of filing the petition it had been doing business in the United States for at least one year as required in the regulation at 8 C.F.R. § 204.5(j)(3)(D). The term "doing business" is defined as:

> [T]he 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.

8 C.F.R. § 214.5(j)(2).

At the time of filing the petition, the petitioner failed to present sufficient documentary evidence, such as corporate tax returns, invoices, receipts, or customs forms, that the company has been doing business in the United States for at least one year. In fact, except for the petitioner's reference on the petition that it operates as an import, export and manufacturing company, the record is essentially devoid of any description of the petitioner's business operations. As an import and export company, it is reasonable to expect the petitioner to submit copies of customs documents to show that it is engaged in the regular, systematic, and continuous provision of goods through importation. The majority of evidence submitted by the petitioner pertains to the United States company, Elite Entrepreneurs, which the petitioner identifies as a subsidiary, but fails to explain its relevance to the petitioner's operations in the United States. 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. at 165. Consequently, the petition must be denied for this additional reason.

An additional issue not addressed by the director is the petitioner's failure to establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity as required in the Act at section 203(b)(1)(C) and the regulation at 8 C.F.R. § 204.5(j)(3)(B). The petitioner does not specifically address the beneficiary's overseas employment. A business license of the foreign company "Shenzhen Ling Hai Costume Co., Ltd." submitted with the immigrant petition identifies the beneficiary as its general manager. However, absent a description of the specific managerial or executive job duties performed by the beneficiary, the AAO cannot conclude that the beneficiary was employed overseas in a primarily managerial of executive capacity for at least one year during the three years preceding the beneficiary's transfer to the United States. 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. at 165.

The beneficiary's title as general manager of "Shenzhen Ling Hai Costume Co., Ltd" raises an additional issue of whether the beneficiary was in fact employed by the purported parent company, "Shenzhen Foreign Trade Group South North Trading Company," also known as "Shenzhen Da Lin Trading United Company." The business license for Shenzhen Ling Hai Costume Co., Ltd indicates that it is a joint venture, yet does not identify the companies involved.[2] As a result, the AAO cannot conclude that the beneficiary was employed overseas by the claimed parent company. As the petitioner has failed to satisfy this essential element, the petition will be 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 will be denied 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. Accordingly, the director's decision will be affirmed and the approval of the petition will be revoked.

ORDER: The appeal is dismissed.

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[2] The AAO notes that in a list of the Shenzhen Foreign Trade Group South North Trading Company's internal departments and branch offices, a company titled "[redacted] Ltd." is identified as a branch office. It is unclear from the record whether the [redacted] Co., Ltd is also known as S[redacted] Ltd. Regardless, the record does not contain any additional evidence substantiating the claim that [redacted], Ltd. is a branch office of the foreign company. 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. at 165.