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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 14 2005
WAC 96 132 52581

IN RE: Petitioner: [redacted]
Beneficiary:

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

DISCUSSION: The Director, California Service Center, initially approved the employment-based visa petition. Upon subsequent review of the record, the director issued a notice of intent to revoke and ultimately revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner avers it is a corporation organized in the State of California in December 1994. It claims to export scrap metal to China. The petitioner seeks to employ the beneficiary as its 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 record provides the following history of this matter:

> The petitioner filed the Form I-140 petition, Immigrant Petition for Alien Worker on April 4, 1996 and the petition was approved May 29, 1996;
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> On July 15, 1997, the director issued a notice of intent to revoke approval, indicating that the beneficiary's October 26, 1996 interview in conjunction with his Form I-485, Application to Register Permanent Residence or Adjust Status, revealed the petitioner to be a sole proprietorship with no real relation to the parent company;
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> On August 18, 1997, the petitioner, through counsel, provided rebuttal to the notice of intent to revoke and on April 16, 1998, the director revoked approval of the petition determining that the documentation submitted in response to the notice of intent to revoke did not overcome the grounds of revocation;
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> On May 12, 1998, the petitioner submitted an untimely appeal to the AAO and on August 6, 1999 the AAO treated the appeal as a motion and remanded the matter to the director for a decision on the motion to reopen;
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> On October 19, 2004, the director reopened the matter and issued a notice of intent to revoke approval determining that the petitioner had not established: (1) that the beneficiary would be employed in a primarily managerial or executive capacity; (2) a qualifying relationship with the beneficiary's foreign employer; or (3) that the petitioner was conducting business in the United States on a regular, systematic, and continuous basis;
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> In a November 15, 2004 rebuttal, counsel for the petitioner contended that a review of the petitioner's evidence at the time of issuance did not warrant denial. Counsel also cited 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), and asserted that Citizenship and Immigration Services (CIS) did not have authority to revoke approval.

Upon review of the record, including the petitioner's rebuttal, the director revoked the petition on January 11, 2005. The director determined that the record did not establish that the beneficiary would be employed in a managerial or executive capacity or that the petitioner had established a qualifying relationship with the beneficiary's foreign employer.

On appeal counsel for the petitioner again cites *Firstland Int'l, Inc. v. Ashcroft* and again asserts that CIS is without authority to revoke approval. Counsel also claims that the beneficiary managed and directed the management of a key function or component of the organization and that if staffing levels were used in deciding whether the alien is a manager or executive, the reasonable needs of the organization within the context of its overall purpose and development stage must be considered. Counsel cites an unpublished decision in support of this last assertion.

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):
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> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

Counsel's assertion in reference to the recent opinion, *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d at 127 (2d Cir. 2004), issued by the United States Court of Appeals for the Second Circuit is not relevant to the matter at hand. The AAO acknowledges that in that opinion, the court interpreted the third and fourth sentence of section 205 of the Act, 8 U.S.C. § 1155 (2003), to render the revocation of an approved immigrant petition ineffective where the beneficiary of the petition did not receive notice of the revocation before beginning his

journey to the United States. *Firstland*, 377 F.3d at 130. Counsel asserts that the reasoning of this opinion must be applied to the present matter and accordingly, CIS may not revoke the approval because the beneficiary did not receive notice of the revocation before departing for the United States, since he was already in the United States when the director issued the revocation.

According to the record of proceeding, however, the petitioner is located in the State of California; thus, this matter did not arise in the Second Circuit and *Firstland* was never a binding precedent. Even as a merely persuasive precedent, moreover, *Firstland* is no longer good law.

On December 17, 2004, the President signed the Intelligence Reform and Terrorism Prevention Act of 2004 (S. 2845). *See* Pub. L. No. 108-458, __ Stat. __ (2004). Specifically relating to this matter, section 5304(c) of Public Law 108-458 amends section 205 of the Act by striking "Attorney General" and inserting "Secretary of Homeland Security" and by striking the final two sentences. Section 205 of the Act now reads:

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

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

Generally, the director's decision to revoke the approval of a petition will be affirmed, notwithstanding the submission of evidence on appeal, where a petitioner fails to offer a timely explanation or rebuttal to a properly issued notice of intention to revoke. *See Matter of Arias*, 19 I&N Dec. 568, 569 (BIA 1988). Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and 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)).

In this matter, the director raised three separate issues in the notice of intent to revoke, based on the eligibility requirements set by the applicable statute and regulations. *See generally,* section 203(b)(1)(C) of the Act; 8 C.F.R. § 204.5(j). The petitioner did not address these issues in rebuttal, instead asserting that the record

did not warrant a denial. However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *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 Dec. 503, 506 (BIA 1980).

On revocation, the director observed that: despite CIS's indication that the description of the beneficiary's duties was too vague and general to support a managerial or executive position, the petitioner had not elaborated on the beneficiary's duties in rebuttal; the petitioner had not clarified who performs the petitioner's marketing, budgeting, finance and accounting, advertising, and personnel functions; the petitioner had initially indicated that it employed three individuals, including the beneficiary but had not substantiated the employment of the "secretary" and the "finance manager;" it was reasonable to believe that with the petitioner's organizational structure, the beneficiary would be assisting with the day-to-day non-supervisory duties and that the performance of those menial tasks precluded the beneficiary from being considered a manager or executive; and, the petitioner had not shown that the beneficiary manages or directs the management of a department, subdivision, function, or component of the petitioner but rather appears involved in the performance of routine operational activities.

The director also observed that the notice of intent to revoke had specifically requested the petitioner's organizational chart and a more detailed description of the beneficiary's duties in the United States, but that the petitioner had failed to provide this information. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The director concluded that the record contained insufficient evidence to demonstrate that the beneficiary would be performing as an executive or manager.

On appeal, counsel for the petitioner asserts that the beneficiary managed and directed the management of a key function or component of the organization and that if staffing levels were used in deciding whether the alien is a manager or executive, the reasonable needs of the organization within the context of its overall purpose and development stage must be considered. Counsel cited an unpublished decision in support of his assertion.

Counsel's assertion on this issue is not persuasive. The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). In the present matter, the petitioner has provided a general description of the beneficiary's duties indicating that the beneficiary is "responsible for managing and directing overall U.S. operations including making business development plan, coordinating U.S. suppliers with parent company, designing, planning and implementing business expansion plan for emerging commodities market in China" and "is also in charge of the entire business operations and supervising accounting, personnel and other administrative duties." This general description is not sufficient to establish that the beneficiary will perform primarily managerial or executive duties. 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).

Counsel should note that while performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. In the present matter, the petitioner has not explained who will perform the daily operational and administrative tasks, if not the beneficiary. The record does not demonstrate that the beneficiary will perform primarily in a managerial capacity.

Of further note, the term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. However, if a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided the necessary evidence to demonstrate that the beneficiary manages an essential function.

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

Counsel's reference to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee, is not relevant to the instant matter. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

On revocation, the director also determined that the petitioner had not established a qualifying relationship with the beneficiary's foreign employer. The director observed that the notice of intent to revoke listed the necessary documentation to establish that the foreign parent company had, in fact, paid for its interest in the U.S. entity, but that the petitioner had not provided this evidence. Again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The AAO observes that counsel for the petitioner does not address this issue on appeal. Accordingly, the director's determination with respect to the issue of qualifying relationship will not be disturbed.

CIS regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed. *See* 8 C.F.R. § 245.1(a). If the beneficiary of an approved visa petition is no longer eligible for the classification sought or if the petition was approved in error, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for "good and sufficient cause." Notwithstanding the CIS burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for 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).

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

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.

ORDER: The appeal is dismissed.