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U.S. Department of Justice
Immigration and Naturalization Service

**preventing clearly unwarranted
invasion of personal privacy**

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File:

Office: VERMONT SERVICE CENTER

Date:

NOV 19 2002

IN RE: Petitioner:
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)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

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DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Vermont Service Center. Upon subsequent review, the director properly issued a notice of intent to revoke, and ultimately revoked the approval of the petition. The director's decision to revoke was affirmed by the Associate Commissioner for Examinations on appeal. The matter is now before the Associate Commissioner on a second motion to reopen and reconsider. The motion will be dismissed.

The petitioner is engaged in the import and export of fresh bananas. It seeks to employ the beneficiary as its general manager. Accordingly, it seeks 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 director determined that the petitioner had not established that the beneficiary had been and would be employed in a managerial or executive capacity. The Associate Commissioner affirmed this determination on appeal on January 8, 2001. The Associate Commissioner granted a subsequent motion to reopen and reconsider and dismissed the underlying appeal on the basis that the petitioner had not established that the beneficiary met all the elements within the definition of managerial capacity.

On motion, the petitioner submits its organizational chart for the first time in this proceeding and states that it was not previously submitted on motion because the previous motion was only a motion to reconsider and not a motion to reopen. The petitioner also submits an affidavit of the beneficiary. In addition, the petitioner references an obvious typographical error contained in the Associate Commissioner's original decision of January 8, 2001 and asserts that the Service made its decision contrary to its fact finding. The petitioner also asserts that the correct issues of the case are "(1) what provisions of the Code or Rules should apply in this case; (2) whether the Service had valid grounds to revoke previously approved I-140 petition in pursuant of the law; and (3) if so, what the grounds are [sic]." The petitioner further asserts that the Service treated unpublished decisions it had cited improperly and incorrectly applied 8 C.F.R. 103.2(b)(1). The petitioner finally asserts that the use of the word "execute" when applying the definition of managerial capacity is inconsistent with the "Code or the CFR."

8 CFR 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.

On motion, counsel for the petitioner has submitted its

organizational chart and an affidavit of the beneficiary. The petitioner's organizational chart is not "new" evidence. The organizational chart of the petitioner could have been submitted with the petition, in rebuttal to the director's notice of intent to revoke, on appeal, and on the first motion filed. The petitioner made the choice to present its first motion solely as a motion to reconsider and not a motion to reopen. Such choices are outside the purview of this office and remain the decision of the petitioner. Likewise, the affidavit of the beneficiary submitted on motion is not "new." The affidavit re-states the beneficiary's job duties, provides its new address, declares the petitioner's main business, its latest annual income, and the number of its employees in the year 2000. The affidavit also provides the education of the beneficiary and information about the beneficiary's family. A review of these two documents that the petitioner submits on motion reveals no fact that could be considered "new" under 8 CFR 103.5(a)(2). The evidence submitted was previously available and could have been discovered or presented in the previous proceedings.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. INS v. Doherty, 502 U.S. 314, 323 (1992) (citing INS v. Abudu, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." INS v. Abudu, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion to reopen will be dismissed.

Furthermore, 8 CFR 103.5(a)(2) states, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The petitioner's statements, references, and assertions are not supported by any pertinent precedent decisions. For informational purposes only, the Associate Commissioner will address the petitioner's groundless concerns raised in its letter.

The petitioner's reference to an obvious typographical error contained in the Associate Commissioner's original decision of January 8, 2001 and assertion that the Service decision was contrary to the Service's own fact finding is specious. The Associate Commissioner found that the petitioner had not established the elements necessary to support a conclusion that the beneficiary would be employed in a managerial capacity. The Associate Commissioner addressed each element and found the

evidence lacking. The Associate Commissioner's typographical error resulting in the statement that "[t]he record does contain sufficient evidence to support the petitioner's claim" is obviously outweighed by the substantive paragraphs stating that the petitioner had not established the necessary facts to overturn the director's decision.

The petitioner's assertion that the correct issues of the case involve what law is applicable and whether the Service had valid grounds to revoke the approval of the petition have no merit. The petitioner requested the beneficiary's classification as a multinational manager. The issue in this case is whether the petitioner has provided sufficient evidence to establish that the beneficiary is a manager as defined in Section 101(a)(44)(A) of the Act. The director and the Associate Commissioner after full review of the record determined that the petitioner had not sustained its burden in this regard. Simply because this proceeding involves a revocation of an approved petition does not negate the central issue of the case, that is whether the petitioner had established that the beneficiary would be employed primarily in a managerial capacity. However, for clarification on the petitioner's behalf we refer the petitioner to Section 205 of the Act, 8 U.S.C. 1155, that states "[t]he Attorney General 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 204 [of the Act]." By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the revocation of a petition's approval, provided the director's revised opinion is supported by the record. Matter of Ho, 19 I&N Dec. 582 (BIA 1988). The director listed the reasons the petitioner failed to meet its burden and the reasons provided thereof are valid. The Associate Commissioner sustained the decision to revoke because the evidence on record at the time the decision was rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intent to revoke, warranted such denial. Matter of Ho, supra.

The petitioner's assertion that the Service did not properly reference unpublished decisions is fallacious. Unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. 103.3(c). The petitioner's use of unpublished decisions in an attempt to support its motion to reconsider is not given any weight.

The petitioner's final assertion that the use of the word "execute" when applying the definition of managerial capacity is inconsistent with the "Code or the CFR" applies an incorrect definition to the word. In reading the Associate Commissioner's decision it is clear the word "execute" simply refers to the necessity of the beneficiary carrying out each of the duties of the four elements of the statutory definition.

The petitioner's second motion to reopen and reconsider is not based on any new evidence and does not provide any reasons for reconsideration supported by pertinent precedent decisions. It should be noted for the record that, unless the Service directs otherwise, the filing of a motion to reopen or reconsider does not stay the execution of any decision in a case or extend a previously set departure date. 8 CFR 103.5(a)(1)(iv).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. 8 CFR 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the Associate Commissioner will not be disturbed.

ORDER: The motion is dismissed.