

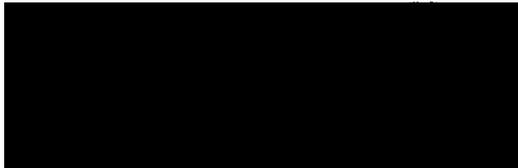
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U.S. Citizenship  
and Immigration  
Services

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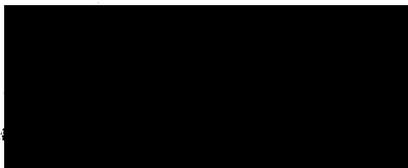
Office: CALIFORNIA SERVICE CENTER

Date: JUN 17 2005

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.

for Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Nevada in December 1999. It sells garden pottery. It seeks to employ the beneficiary as its chief operating officer. 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 director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity for the United States petitioner.

On appeal, counsel for the petitioner asserts that the director committed legal and factual error in determining that the beneficiary is not a manager or executive for the United States entity. Counsel submits a brief and documentation 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):

\* \* \*

- (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 issue in this proceeding is whether 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.

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 January 21, 2003 letter appended to the petition, counsel for the petitioner asserted that the beneficiary had been the "chief operation officer" since April 2000<sup>1</sup> and had executed the successful business set-up and market expansion in the United States. Counsel stated:

[The beneficiary] will continue to handle, delegate or personally attend to all activities required to establish [the petitioner], and he will continue to guide this investment to a highly profitable level. Specifically, [the beneficiary] shall have complete discretionary powers over day-to-day operations, payroll and banking duties, execution of asset and property leases, hiring and firing of employees, setting-up budgets to establish the project, scheduling orders, and other duties as is necessary.

The petitioner also provided a "confirmation of executive and managerial duties for [the beneficiary]," dated January 10, 2000 and signed by the claimed parent company. The petitioner stated:

As a matter of record we confirm that [redacted] recognizes you as the Chief Operating officer of both World Zone USA Inc and [the petitioner] located in Nevada USA. You are expected to continue both executive and managerial duties for World Zone USA as well as develop those same duties for [the petitioner] as you see fit. It is expected that you will handle, delegate or personally attend to all activities required to establish [the petitioner] and guide this investment to a profitable level.

You are to have complete discretionary powers over, but not limited to, [h]iring and firing of employees, payroll and banking duties, execution of asset and property leases, expenditure to establish the project as well as all buying and selling required within the scope of the day[-]to[-]day operations, in essence any and all activities you see fit.

On April 10, 2003, the director requested further evidence on the issue of the beneficiary's managerial or executive capacity. The director requested: an organizational chart describing the petitioner's managerial hierarchy and staffing levels as of the date of filing the petition which should include the names of all executives, managers, supervisors, and employees within each department or subdivision; a list of all employees under the beneficiary's supervision by name and job title; a brief description of job duties and educational level for all employees under the beneficiary's supervision; and the source of remuneration of all employees. The director requested copies of the petitioner's state wage report and a description of the duties of each of the employees' job duties listed on the state form, Internal Revenue Service (IRS) Forms 941, Quarterly Wage Report for the last two quarters, the petitioner's payroll summary, IRS Forms W-2, Wage and Tax Statement, and any IRS Forms 1099, Miscellaneous Income, evidencing wages or compensation paid for 2002. The director also requested a more detailed description of the beneficiary's job duties and the approximate percentage of time the beneficiary spent in each of his listed duties.

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<sup>1</sup> It is not clear whether counsel is referring to the beneficiary's position with World Zone USA, a separate and distinct corporate entity, or the petitioner, or both of the entities.

On July 2, 2003, the petitioner provided its response including an undated organizational chart. The chart listed the beneficiary as president of World Zone USA with undefined tiers of departments subordinate to the beneficiary and as president of the petitioner with an individual in sales and an individual in operations subordinate to the beneficiary's position. The petitioner also noted that it employed eight regular and seasonal staff in the sales and operations divisions. The petitioner re-submitted the January 10, 2000 letter confirming the beneficiary's duties; a July 28, 1998 electronic mail to the beneficiary discussing investments; several electronic transmissions and letters written in 1998 and 1999 discussing shipping, purchase orders, potential business locations, and sales; and board resolutions issued in each quarter of 1999 by the foreign entity authorizing the beneficiary to explore the possibility of setting up a sales office in the United States.

The petitioner provided a payroll summary for the periods ending June 13, 2003 and June 20, 2003. The payroll summaries did not list the petitioner's employees by name or job title. The petitioner provided the first page of its IRS Form 941 for the quarter ending March 31, 2002 showing \$7,058 had been paid in wages and its IRS Form 941 for the quarter ending March 31, 2003 showing \$8,688 had been paid in wages. The petitioner's IRS Forms 1120, U.S. Corporate Income Tax Return showed \$69,960 in salaries and wages and \$0 compensation of officers in 2000; \$37,139 in salaries and wages and \$0 compensation of officers in 2001; and \$0 in salaries and wages and \$12,000 in compensation of officers in 2002. The petitioner did not provide copies of its issued IRS Forms W-2, its IRS Forms 1099, if any, complete IRS Forms 941, or state wage reports.

On August 8, 2003, the director again requested evidence in this matter. The director requested the petitioner's organizational chart as of the date of filing the petition. The director requested that the chart include its managerial hierarchy and staffing levels as of the date of filing the petition; the names of all executives, managers, supervisors and employees within each department or subdivision; a list of all employees under the beneficiary's supervision by name and job title; a brief description of job duties and educational level for all employees under the beneficiary's supervision; and the source of remuneration of all employees. The director observed that the petitioner had submitted only the first page of the IRS Forms 941 for the first quarters of 2002 and 2003. The director requested that the petitioner provide all pages of its IRS Forms 941 for the first and second quarters of 2003.

In an October 7, 2003 response, counsel for the petitioner provided a revised, undated organizational chart showing the beneficiary as the petitioner's president and a "division executive," [REDACTED] who the petitioner claimed had a Bachelor of Arts degree, reporting to the beneficiary. The chart also included a pottery yard foreman and a sales and operation management controller reporting to the "division executive." The chart also noted several salespersons and general laborers reporting to the pottery yard foreman and the sales and operation "manager." Counsel also stated that the petitioner was only required to submit one-page IRS Forms 941. The IRS Form 941 for the second quarter of 2003 indicated that the petitioner had paid \$19,338 in wages.

On March 9, 2004, the director denied the petition. The director determined that: the petitioner's job description of the beneficiary's duties did not establish that the beneficiary performed in an executive capacity; the petitioner's organizational structure did not demonstrate that the nature of the petitioner's business would require an executive or manager to operate the business, but rather showed that the

beneficiary would be assisting with day-to-day non-supervisory duties; the beneficiary was in essence a first-line supervisor of non-managerial and non-professional employees; and, the petitioner had not established that the beneficiary primarily managed a function of the business rather than performing routine operational activities. The director concluded that the petitioner had not provided sufficient evidence to demonstrate that the beneficiary would be employed in a primarily executive or managerial capacity.

On appeal, counsel for the petitioner claims that common sense dictates that the petitioner's description of the beneficiary's duties qualify the beneficiary as an executive. Counsel references the petitioner's description of the beneficiary's duties included in the petitioner's L-1A intracompany transferee petition and contends that the job description shows that the beneficiary established the company's goals and policies. Counsel also notes the director's failure to articulate some reasonable basis for finding the petitioner's staff or structure to be unreasonable. Counsel asserts that the director failed to consider the nature of the petitioner's business and failed to consider the reasonable needs of the petitioner in light of its overall purpose and stage of development.

Counsel asserts that the beneficiary designs and implements sales procedures and protocols and directs the managers beneath him on "how to carry out supervisory duties in the sale of products." Counsel references an organizational chart<sup>2</sup> and contends that the petitioner's organizational structure indicates that the beneficiary "commands the staff first through the Division Executive, [REDACTED] then [REDACTED] Davidson, Sales and Operations manager." Counsel provides an unsworn statement from [REDACTED] explaining his duties for the petitioner and an unsworn statement [REDACTED] indicating that he owns a nursery that offers labor and employees to the petitioner.

Counsel also takes issue with the director's interpretation of the definition of "manager." Counsel observes that the director misapplied the definition of manager to include only individuals who managed professionals.<sup>3</sup> Counsel asserts that the petitioner has demonstrated that the beneficiary manages the petitioning organization and that "he supervises the work of other, [sic] managers, has the authority to hire/fire and execute other personnel actions, exercises discretion over the day-to-day operations of the functioning of the petitioner."

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<sup>2</sup> The petitioner's initial organizational chart lists the petitioner's employees and shows that David Wechsler is an employee in the operations division, and that [REDACTED] is an employee in the sales division. The chart also lists [REDACTED] as an employee in the sales division and seven named employees as regular and seasonal staff. The petitioner's revised organizational chart provides additional tiers of authority but does not explain the two different versions.

<sup>3</sup> Counsel also asserts that the director failed to consider that the petitioner's organizational chart shows that the beneficiary's direct subordinate, [REDACTED]. However, the petitioner only submits evidence of the educational credentials of this individual on appeal. Moreover, an individual's education is not the determining factor when considering whether an individual holds a managerial or professional position, rather, the duties of the position dictate the managerial or professional nature of the position.

Counsel's assertions and documentation are not persuasive. 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. § 204.5(j)(5). The petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

The description of the beneficiary's duties, as provided by the petitioner's parent company, indicates that the beneficiary will be responsible for establishing the petitioner, including "[h]iring and firing of employees, payroll and banking duties, execution of asset and property leases, expenditure to establish the project as well as all buying and selling required within the scope of the day[-]to[-]day operations." This general description suggests that the beneficiary's principal duty is to develop the petitioner's business. The actual duties themselves 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). The petitioner does not provide further detail or an allocation of the beneficiary's time associated with the beneficiary's actual day-to-day 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. at 1103.

Counsel's assertion that common sense dictates that the description of the beneficiary's duties<sup>4</sup> qualify the beneficiary as an executive is not persuasive. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

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<sup>4</sup> In addition to the vague description provided in the Form I-140 petition, counsel references a description of the beneficiary's duties included in the L-1A intracompany transferee petition which is included in the record. The L-1A intracompany transferee description provides that the beneficiary was "[r]esponsible for the successful set-up of the companies, managing and directing daily activities to obtain optimum efficiency and economy of operations to ensure stability and continued profitability. Has established personnel programs and has developed and implemented company policies and goals. Has specified budgetary requirements and necessary controls to conform with appropriations and for the maintenance of accounting records. Has planned and directed marketing and sales operations, determined mark-up and mark-down percentages to enhance profitability, and represented the company in various trade association meetings to promote products." However, this description is composed of conclusory statements and is indicative of an individual spending a portion of his time providing the petitioner's operational and marketing services. Although specifically requested by the director in the Form I-140 proceeding, the petitioner has not provided a description of the beneficiary's job duties that establishes what proportion of the beneficiary's duties is managerial, and what proportion is non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Counsel points out that the director failed to articulate a reasonable basis for finding the petitioner's staff or structure to be insufficient to support an executive or manager. The AAO acknowledges that the director fails to clearly detail the deficiencies in the record. However, the AAO observes that the petitioner, despite repeated requests by the director, failed to provide a detailed description of the beneficiary's duties, failed to provide evidence substantiating that it employed the personnel listed on either of the disparate organizational charts submitted, and failed to provide even brief descriptions of the job duties of the individuals listed on the organizational chart. 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)).

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 this matter, the record before the director did not support the information listed on either of the petitioner's organizational charts. The AAO finds that upon review of the totality of the record, the petitioner has failed to substantiate that it employs sufficient staff to relieve the beneficiary from performing primarily non-qualifying duties. The record is insufficient to show that the beneficiary performs primarily high-level responsibilities and is relieved from spending a majority of his time on day-to-day functions.

Of note, it is appropriate for Citizenship and Immigration Services (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.*

As referenced above, counsel's assertion on appeal that the beneficiary directs the managers beneath him and that the petitioner's organizational structure demonstrates that the beneficiary commands a tier of "managers" subordinate to him is not persuasive. The petitioner has not provided substantive evidence that it employs the individuals identified on either of the petitioner's organizational charts. Despite the director's request for evidence of the employment or compensation of the individuals subordinate to the beneficiary, the petitioner failed to provide such evidence. 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 record contains no evidence of salaries or wages paid to individuals when the petition was filed. 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). The petitioner's IRS Form 941 for the first quarter of 2003 shows the petitioner paid \$8,688 in salaries but does not designate who received a salary and in what amount.

Further, the petitioner's submission of two different undated organizational charts is not explained. 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. 582, 591-92 (BIA 1988).

Counsel's submission of unsworn statements from two claimed employees or contractors will not be considered on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). As noted above, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the appeal will be adjudicated based on the record of proceeding before the director.

Counsel correctly points out that the director's interpretation of the definition of "manager" appears to limit the definition to include only individuals who manage professionals. The AAO notes that the managerial definition does not require the beneficiary to supervise personnel, however, if it is claimed that the beneficiary's duties primarily involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial in order to conform to the definition of managerial capacity. *See* § 101(a)(44)(A)(ii) of the Act. Again, in this matter, the record does not demonstrate that the beneficiary's duties involve primarily supervisory duties or whether any of the beneficiary's subordinates are supervisory, managerial, or professional employees.

Finally, counsel has not explicitly claimed that the beneficiary's primary duty is to manage an essential function. However, the AAO notes that if a petitioner claims that a beneficiary is managing an essential function, the petitioner must furnish a comprehensive and detailed description of the duties to be performed, which identifies the function with specificity, articulates the essential nature of the function, and establishes 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 evidence that the beneficiary manages an essential function.

Contrary to counsel's conclusion, the petitioner has not demonstrated that the beneficiary manages the petitioning organization or that "he supervises the work of other, [sic] managers, has the authority to hire/fire and execute other personnel actions, exercises discretion over the day-to-day operations of the functioning of the petitioner." 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 Dec. 503, 506 (BIA 1980).

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner comprise primarily executive or managerial duties.

Beyond the decision of the director, the petitioner has not established that the beneficiary's duties for the foreign entity were primarily executive or managerial for one of the three years prior to entering the United States as a nonimmigrant. The foreign entity indicated in its January 10, 2000 letter that the beneficiary had been employed with the foreign entity since 1995 and that the beneficiary had most recently worked on developing the foreign entity's presence in the USA. The record also contains evidence that the beneficiary worked in Canada on behalf of the foreign entity in an effort to establish international marketing in Canada. The record contains evidence that the beneficiary was involved in obtaining freight quotations, organizing shipping schedules, and preparing purchase orders. Despite the director's request for further evidence on this issue, the petitioner does not detail the beneficiary's duties for the foreign entity in any of the three years prior to the beneficiary's entry into the United States as a nonimmigrant and does not provide a detailed organizational chart for the foreign entity. The record is insufficient to establish that the beneficiary's duties for the foreign entity were primarily managerial or executive. 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 at 165 (citing *Matter of Treasure Craft of California*, 14 I&N at 190.) For this additional reason, the petition will not be approved.

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).

Finally, counsel references previous approvals of the beneficiary as an L-1A intracompany transferee but does not explicitly contend that such approvals should also result in the approval of the Form I-140 that is the subject of this proceeding. However, the AAO notes for the record that it is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

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.