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[REDACTED]

FILE: [REDACTED]
WAC 03 090 54529

Office: CALIFORNIA SERVICE CENTER

Date: **OCT 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:

[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, denied the employment-based petition. The Administrative Appeals Office (AAO) affirmed the director's denial decision on appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be dismissed.

The petitioner is a corporation organized in the State of California in October 1997. It cleans and repairs Persian and Indo Persian carpets. It seeks to employ the beneficiary as its president. 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: (1) a qualifying relationship between the petitioner and the foreign entity; or (2) that the beneficiary would be employed in a primarily managerial or executive capacity for the United States petitioner. On April 8, 2005, the AAO affirmed the director's decision on both issues.

On the issue of the petitioner's qualifying relationship with the foreign entity, the AAO observed that the petitioner had submitted confusing and incomplete evidence regarding its ownership and control and had failed to offer evidence to show that the foreign entity had paid for its interest in the petitioner. On the issue of the beneficiary's managerial or executive capacity for the petitioner, the AAO noted that counsel for the petitioner had claimed that the beneficiary qualified as both a manager and an executive for the petitioner. The AAO also implied that the petitioner relied on partial sections of the two statutory definitions to demonstrate that the beneficiary was both a manager and an executive. In addition, the AAO found that the beneficiary's description of his job duties was indicative of an individual performing sales and first-line supervisory duties and that the petitioner had not established that the beneficiary's subordinates held professional positions. Moreover, the AAO found that the petitioner had failed to document the proportion of time the beneficiary spent on managerial and executive functions and the proportion of time spent on non-managerial and non-executive functions. Finally, the AAO addressed counsel's assertion that the prior approvals of the beneficiary's eligibility as an L-1A intracompany transferee substantiated the beneficiary's eligibility for this employment-based immigration classification.

The regulation at 8 C.F.R. § 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. 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. The regulation at 8 C.F.R. § 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 [Citizenship and Immigration Services] 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.

On motion counsel does not submit any new evidence. On the issue of qualifying relationship, counsel contends that the AAO focused on irrelevant factors and ignored the clear reality that the beneficiary owns both the petitioner and the Canadian company. Counsel argues that the AAO failed the test established in *Henry v INS*, 74 F.3d 1, 4 (1st Cir. 1996) by neglecting to consider significant factors, attaching weight to factors that did not appropriately bear on the decision, and making a clear error in judgment when weighing all the factors.

The AAO observes that if it accepts counsel's perception of the "clear reality" that the beneficiary owns both the Canadian entity and the petitioner, the AAO's questioning of the legitimacy of the petitioner's corporate status would be negatively answered. As the AAO observed in its initial decision, the record suggests that the beneficiary has created "shell" corporation(s) to enable the transfer of the beneficiary to the United States pursuant to this visa classification. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). If the U.S. entity is a [REDACTED] corporation, the petitioner would in effect be the beneficiary, a nonimmigrant temporary worker, and a nonimmigrant temporary worker is not competent to offer permanent employment to an alien beneficiary for the purpose of obtaining an immigrant visa for the beneficiary under section 203(b)(1)(C) of the Act. *Matter of Thornhill*, 18 I&N Dec. 34 (Comm. 1981).

The AAO reminds counsel once again that a corporation is a separate and distinct legal entity from its owners or stockholders. *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). The record in this matter does not include evidence that the *Canadian entity* actually paid for its interest in the petitioner. The record does not contain evidence showing that the beneficiary owns the Canadian entity. Despite the director's request for evidence to substantiate the ownership of both entities, the petitioner has declined to submit such evidence. Although counsel believes these issues are tangential to the reality of the beneficiary owning both entities, the AAO declines to speculate, as counsel seems to wish, on the beneficiary's ownership of the Canadian entity and his "indirect" ownership of the U.S. entity. If the Canadian entity and the petitioner enjoy a qualifying relationship and are not [REDACTED] corporations, the Canadian entity and the petitioner should have documentation to establish such ownership and control. In this matter, the petitioner has not submitted the evidence requested, has not established that the petitioner and the Canadian entity are legitimate corporations, or that the beneficiary is seeking to enter the United States to work for an employer other than himself, a nonimmigrant temporary worker.

The AAO also observes that counsel appears to acknowledge that the Canadian entity is failing to maintain operations without the benefit of the beneficiary's onsite supervision. This implicit admission underscores the fragility of the Canadian entity as a multinational entity and further draws into question the viability of both the petitioner and the foreign entity as legitimate corporate entities.¹

¹ Although this comment more directly relates to the issue of the foreign entity's doing business which is required to maintain eligibility for this visa classification, it also affects tangentially the petitioner's qualifying relationship with the Canadian entity.

The petitioner has not provided sufficient evidence or argument on motion to reconsider the prior decision. The petitioner has not established a qualifying relationship between the petitioner and the foreign entity. The previous decision of the AAO on this issue is affirmed.

On the issue of the beneficiary's employment in a managerial or executive capacity for the United States entity, counsel claims on motion that the AAO determined that the beneficiary was not eligible for this visa classification because he is a "hybrid" manager and executive. However, the AAO in this matter properly pointed out that a petitioner claiming that a beneficiary would be both a manager and an executive must establish each element of the definition of executive capacity and each element of the definition of managerial capacity. In other words, for example, the petitioner cannot rely on the beneficiary's fulfillment of two of the elements found in the definition of managerial capacity and two of the elements found in the definition of executive capacity and claim that the beneficiary is eligible for this visa classification.

On motion, counsel implies that the AAO has inserted its business judgment in place of the petitioner's business judgment on the issue of professional employees. However, the AAO determined that the *petitioner's description* of the duties for the positions of accountant and plant manager did not demonstrate that the positions were professional positions. In other words, the record was insufficient to establish that the beneficiary supervised employees holding professional positions. The AAO notes that 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)). Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. The petitioner failed to provide sufficient evidence to establish this necessary element of managerial capacity.

Moreover, the AAO also noted that the petitioner had failed to document the proportion of time the beneficiary spent on managerial and executive functions and the proportion of time spent on non-managerial and non-executive functions. The AAO determined that it could not conclude that the beneficiary would be performing *primarily* managerial or primarily executive duties. See e.g. *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Counsel does not address this determination on motion. For the record, the AAO notes that the statute requires that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also "principally" or "chiefly" perform managerial or executive duties.

On review, the petitioner has not presented sufficient evidence or argument on motion to reconsider the prior decision. The petitioner has not established that the beneficiary's duties for the petitioner will include primarily executive or managerial duties. The previous decision of the AAO on this issue is affirmed.

On motion, counsel references the AAO's discussion of prior approvals and the impact of prior approvals on the matter at hand. Counsel argues that the plain language of the statutes regarding adjudication of

nonimmigrant intracompany Form I-129 transferees and adjudication of employment-based immigrant petitions requires identical interpretations. However, as the AAO explained there are significant differences² between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. Cf. §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427.

Moreover, the AAO noted that many Form I-140 immigrant petitions are denied after CIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Further, the AAO observed that it is not bound or estopped by the previous decisions of the service center director. The AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Finally, and most importantly, each petition is a separate record of proceeding and receives an independent review. *See* 8 C.F.R. § 103.8(d). When making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). The AAO finds that if the previous nonimmigrant petitions were approved based on the same unsupported information that is contained in the current record, the approval would have constituted material and gross error on the part of the director. The AAO 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).

Counsel does not provide new facts supported by affidavits or other documentary evidence and does not cite any pertinent precedent decisions to establish that the AAO's decision was based on an incorrect application of law or

² Counsel indicates that the only difference in the immigrant and nonimmigrant visa classifications for managers and executives is that the immigrant classification requires that the petitioner had been doing business for one year prior to filing the immigrant petition. Counsel fails to observe that the immigrant classification also requires that the petitioner have the ability to pay the beneficiary the proffered wage and that the nonimmigrant classification requires that the petitioner's offer of employment be temporary as well as including a category of specialized knowledge to note only a few of the significant differences between the two visa classifications.

policy. On review, the petitioner has not presented sufficient evidence or argument on motion to reconsider its prior decision. 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. The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The previous decision of the AAO will be affirmed.

ORDER: The motion is dismissed and the decision of the AAO dated April 8, 2005 is affirmed.