



U.S. Citizenship
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Services

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FILE:

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SRC 05 144 51648

Office: TEXAS SERVICE CENTER

Date: JAN 24 2006

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

DISCUSSION: The Director, Texas Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant immigrant petition 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 Florida that offers travel services to travel agencies. The petitioner seeks to employ the beneficiary as its president and chief executive officer.

The director denied the petition concluding that: (1) the beneficiary was not employed by the foreign entity in a primarily managerial or executive capacity; (2) the beneficiary would not be employed by the United States entity in a primarily managerial or executive capacity; and (3) a qualifying relationship did not exist between the foreign and United States entities at the time of filing.

On appeal, counsel for the petitioner contends that in its review of the immigrant petition, Citizenship and Immigration Services (CIS) failed to consider the concept of functional manager, a capacity in which counsel claims the beneficiary would be employed in the United States entity. Counsel also claims that CIS did not consider the petitioner's reasonable needs in its denial of the requested classification. With regard to the existence of a qualifying relationship, counsel submits a stock certificate identifying the foreign entity as the owner of 51 shares of the petitioner's stock as proof of the purported parent-subsidiary relationship. In addition, counsel submits a brief in support of the claims on 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 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.

The first issue in this proceeding is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

The petitioner filed the instant petition on April 25, 2005, on which it noted its employment of two workers, and requested employment of the beneficiary as its president-chief executive officer. In a letter submitted

with the petition, dated April 22, 2005, the petitioner's counsel provided the following description of the job duties associated with the beneficiary's proposed position:

[S]he will continue to coordinate [the petitioner's] entire activities, develop and execute the necessary policies to effectively direct its operations and expand its client base; establish financial objectives; plan, develop and establish administration policies and objectives in accordance with board directives; and coordinate functions and operations of company's activities. She will enjoy wide latitude in her discretionary decision-making authority and will report directly to the Foreign Company's Board of Directors.

Accompanying the petition was the petitioner's federal and state quarterly wage reports for the quarters ending December 31, 2003 through December 31, 2004. The petitioner's December 31, 2004 Employer's Quarterly Report for the State of Florida identified the beneficiary and one additional worker as the sole employees of the company during this time.

In a Notice of Intent to Deny, dated May 16, 2005, the director asked that the petitioner provide a statement describing the beneficiary's daily job duties, including supervisory duties, as well as the amount of time devoted to each. The director also asked that the petitioner identify the employees supervised by the beneficiary and their job titles and job duties, and submit an organizational chart of the company's staffing levels. The director noted that the documentary evidence must establish that "the primary part of the beneficiary's proposed duties" in the United States would be managerial or executive in nature.

Counsel responded in a letter dated June 14, 2005, stating:

As President/General Manager of the U.S. Company, the core duties of [the beneficiary's] position as General Manager is related to the coordination of its services of discount travel promotion and specialized package tours in Ecuador. [The beneficiary] is its highest employee and directs the activities of the entire company, which include representing the company and negotiating contracts. She controls expenses, directs and motivates staff, consolidates and updates sales policies and procedures, coordinates operations and resources and represents the company in industry events. She establishes its goals, expansion policy and budgets, and implements marketing policy decisions. She has full discretionary power over all decisions reporting only to its Board of Directors.

Counsel noted that the beneficiary's subordinate employees include an administrative assistant and marketing director, both of whom were identified on the accompanying organizational chart, as well as three sales representatives. Counsel provided job descriptions for each of the lower-level employees, while noting that the beneficiary does not perform duties directly related to the company's operations. Counsel further noted "with any managerial or executive-level position one cannot breakdown the time spent in different activities," and consequently, neglected to provide an allocation of the amount of time the beneficiary would devote to each job duty.

In a decision dated June 23, 2005, the director concluded that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Following a review of the beneficiary's proposed role in the petitioning entity, the director stated that the petitioner's limited staffing levels demonstrated "that the bulk or primary part of the beneficiary's proposed

job assignment in the United States will be outside the scope of the 'executive' or 'managerial' capacities as defined." The director also noted counsel's failure to provide an allocation of the time the beneficiary would spend on each task. Consequently, the director denied the petition.

In an appeal and appellate brief filed on July 25, 2005 and August 22, 2005, respectively, counsel states that CIS misconstrued the petitioner's business as a travel agency, thereby erroneously concluding that the petitioner's staff would not support the beneficiary in a primarily qualifying capacity. Counsel notes the concept of "functional manager" provided by the statutory definition of "managerial capacity" and states "because the Beneficiary performs the essential functions that she is solely responsible for[,] [her employment] satisfies the definition of Managerial capacity per the regulations." Counsel discusses an unpublished decision by the AAO, stating that as in the AAO's decision, the beneficiary in the instant matter "performs essential functions that are not non-managerial in nature." Counsel states that "the Beneficiary's [essential] duties include direction of the entire company and negotiating contracts, to establish goals [and] policies, budgets and implementing marketing policies." Counsel references the employees and subcontractors identified on the petitioner's organizational chart as evidence of the petitioner's employment of a staff that would be sufficient to perform the day-to-day operations of the business. Counsel also contends that CIS failed to consider the reasonable needs of the petitioning entity when denying classification of the beneficiary as a multinational manager or executive.

Upon review, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

The AAO notes an inconsistency in the beneficiary's purported employment capacity. Counsel contended in his April 22, 2004 letter that as the company's president, the beneficiary would be employed in an executive capacity. On appeal, however, counsel references the regulatory definition of "managerial capacity" only, and claims that the beneficiary would be employed as a functional manager. The petitioner has not clearly identified the capacity in which the beneficiary would be employed. Additionally, on appeal, the beneficiary's title of "president-chief executive officer" was subsequently changed to "general manager." A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. 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 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).

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 majority of the job description offered by the petitioner failed to identify the specific managerial or executive tasks to be performed by the beneficiary on a daily basis. In its April 22, 2005 letter, the petitioner generally described the beneficiary's job responsibilities, stating that she would "coordinate [the company's] activities, develop and execute the necessary policies," "establish financial objectives . . . and administration policies," and "coordinate functions and operations of the company's activities." When asked for a more detailed job description, the petitioner again provided such broad job responsibilities as directing the company's activities, controlling expenses, directing the staff, "updat[ing] sales policies," "coordinat[ing] operations" and "implement[ing] market policy decisions." The petitioner has not identified the specific managerial or executive activities, policies or operations to be coordinated or directed by the beneficiary, particularly in relation to the travel services

business. Additionally, the record does not contain documentary evidence, such as a business plan, defining the company's objectives or strategies, which would in turn assist in understanding the "activities" or "operations" to be directed by the beneficiary or its sales and marketing policies. In fact, the description of the beneficiary's job duties is so limited, there is nothing to associate her with the specific role of president or general manager of a travel services business. Reciting the beneficiary's vague job responsibilities or broadcast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will 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 AAO further instructs that merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Id.* at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Moreover, the AAO notes the limited evidence submitted by the petitioner, particularly in response to the requests made by the director in her Notice of Intent to Deny. The regulation states that when necessary, the director may request additional evidence establishing the beneficiary's employment in a qualifying capacity. See 8 C.F.R. § 204.5(j)(3)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The 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). Here, counsel failed to provide the requested allocations identifying the amount of time the beneficiary would dedicate to each task. As the analysis of the beneficiary's employment capacity turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive the requested information is essential. Absent this relevant information, the AAO cannot ascertain whether the beneficiary is primarily performing the duties of a function manager as claimed by counsel on appeal. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The limited record also fails to substantiate counsel's claim that the petitioner employs a staff and utilizes outside contractors sufficient to support the beneficiary in a primarily managerial or executive capacity. Form I-140, as well as the December 31, 2004 Employer's Quarterly Report, which is the report offered by the petitioner most recent to the relevant filing date, identify a staff of two employees, the beneficiary and an administrative assistant who appears to be employed on a part-time basis at a monthly salary of \$400. There is no evidence in the record that the petitioner employed a marketing director or three sales representatives at the time of filing the petition. Therefore, counsel's claims in his June 14, 2005 letter and appellate brief as to the petitioner's staffing levels will not be considered. 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).

Additionally, counsel's claim that the petitioner utilizes the services of outside contractors is not supported by the information contained in the petitioner's 2004 corporate tax return. Specifically, the petitioner identified \$369 paid for "cost of labor" and did not reference any compensation paid for outside services. It is implausible that the petitioner utilized the services of three sales representatives for an aggregate annual fee of \$369. The petitioner has not demonstrated that it employs a staff sufficient to relieve the beneficiary from performing the non-managerial and non-executive operational and administrative tasks of the business. This conclusion is further supported by messages personally sent via e-mail from the beneficiary to travel agencies discussing "do[ing] business" and travel programs and prices. The petitioner also indicated that the

beneficiary represented the petitioner and negotiated contracts. While the representation of the petitioning entity does not necessarily exclude the beneficiary from classification as a multinational manager or executive, it appears, particularly in light of the limited support staff, that the beneficiary would be personally performing the services offered by the petitioner. 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Counsel has not provided evidence to support his claim that the beneficiary would be employed as a functional manager. 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. 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. As discussed above, the petitioner has not satisfied this essential element. As a result, the petitioner has not provided evidence that the beneficiary manages an essential function.

Counsel also references an unpublished AAO decision in support of the beneficiary's employment as a functional manager. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. As discussed previously, the petitioner has not provided documentary evidence that the petitioner utilizes outside contractors who would be responsible for performing the day-to-day operations or functions of the petitioner's business. 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.

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.* Based on the record, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary and an administrative assistant. The petitioner has not submitted documentary evidence supporting its claim that it employs a support staff, particularly sales representatives, who would perform the operational and administrative functions of the business, including the research of travel packages and options and communications with its customers, the travel agencies. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Based on the foregoing discussion, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

The AAO will next address the issue of whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The director noted in her June 23, 2005 decision that "the beneficiary's foreign assignment indicates that his/her duties abroad were composed primarily of the daily productive tasks and first-line supervision of non[-]managerial, non[-]professional employees of the firm." Counsel did not address on appeal the issue of whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. 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).

Upon review, the AAO concurs with the director's decision. Based on the current record, the AAO is unable to determine whether the claimed managerial duties constituted the majority of the beneficiary's duties, or whether the beneficiary was primarily performing non-managerial or non-executive administrative or operational duties. The job description provided by the petitioner's counsel in his June 14, 2005 letter indicated that the beneficiary was responsible for performing such non-qualifying functions of the business as liaising with government agencies and professionals, controlling the company's expenses, and devising "updated sales policies" and marketing policies. The remainder of the beneficiary's job description, which included such limited statements as "established goals, expansion policy and budgeting," and "had full discretionary power over all decisions," failed to clearly represent the specific managerial or executive job duties performed by the beneficiary on a daily basis. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Accordingly, the AAO affirms the director's June 23, 2005 decision with regard to this issue.

The AAO will also address the issue of whether the petitioner demonstrated the existence of a qualifying relationship between the foreign and United States entities at the time of filing the immigrant petition.

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.

Counsel for the petitioner represented in his April 22, 2005 letter the existence of a parent-subsidiary relationship as a result of the foreign entity's ownership of 51 percent of the petitioner entity. As evidence of the purported qualifying relationship, the petitioner submitted a stock certificate reflecting an original issuance of 51 shares of stock in the petitioning entity to the foreign corporation on May 1, 2003. The director did not address the issue of a qualifying relationship in her May 16, 2005 Notice of Intent to Deny.

In her June 23, 2005 decision, the director concluded that the petitioner had not demonstrated the existence of a qualifying relationship. The director noted an unexplained inconsistency in the information reflected on the petitioner's stock certificate and the petitioner's years 2003 and 2004 corporate tax returns, which failed to identify that any portion of the petitioner's stock was owned by a foreign party. Consequently, the director denied the petition.

On appeal, counsel addresses the director's finding that a qualifying relationship does not exist, stating, "[t]he foreign company owns 51% of the US company," and submits "[p]roof of such ownership" in the form of a stock certificate and articles of incorporation.

Upon review, the petitioner has not demonstrated the existence of a qualifying relationship between the foreign and United States entities. Despite the existence of a stock certificate identifying the foreign entity as the owner of 51 shares of stock, the petitioner has not reconciled the purported ownership with the information contained in its 2003 and 2004 corporate tax returns. In fact, counsel does not even address the inconsistency on appeal and submits the same stock certificate already provided by the petitioner at the time of filing. Absent relevant evidence in the form of a revised and certified income tax return or an explanation of the petitioner's correct ownership interests, the AAO cannot conclude that the petitioner has demonstrated the existence of a qualifying relationship. 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 Obaighena*, 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). 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. at 591-92. Accordingly, the appeal will be dismissed for this additional reason.

The AAO notes that CIS previously approved an L-1A nonimmigrant petition for the benefit of the instant beneficiary. It must be noted that many 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). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 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. Because CIS spends less time reviewing I-129 nonimmigrant petitions than 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).

Additionally, if the previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the current record, particularly with respect to the beneficiary's employment with the foreign entity and the petitioner's qualifying relationship with the foreign entity, the approval would constitute 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. at 597. 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). Due to the lack of required evidence in the present record, the AAO finds that the director was justified in departing from the previous nonimmigrant approval by denying the present immigrant petition.

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.