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U.S. Citizenship  
and Immigration  
Services

B4

FILE: [REDACTED]  
LIN 03 139 52606

Office: NEBRASKA SERVICE CENTER

Date: AUG 02 2007

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The appeal was ultimately dismissed. The matter then came before the AAO on motion to reopen and reconsider. While the AAO granted the petitioner's motions to reopen and reconsider, the underlying decision dismissing the appeal was affirmed. The matter is now before the AAO on a second motion to reopen and reconsider. The motion will be dismissed.

The petitioner is an Oregon corporation engaged in exporting commodity items to the Russian Far East. It seeks to employ the beneficiary as its vice 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 denied the petition based on the following independent grounds: 1) the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer; and 2) the beneficiary's proposed employment is not within a managerial or executive capacity.

The petitioner appealed the denial disputing the director's findings. However, the AAO upheld the director's overall decision on the same grounds as those listed above.

On motion, counsel submitted a brief addressing each of the two grounds that served as the basis for the denial and subsequent dismissal of the appeal. The AAO reviewed the record in its entirety and withdrew the prior adverse finding with regard to the petitioner's qualifying relationship with the beneficiary's foreign employer. However, with regard to the beneficiary's proposed employment with the U.S. petitioner, the AAO reaffirmed the prior finding and provided an in-depth analysis in support of its decision.

On second motion, counsel submits another brief and additional evidence addressing the remaining ground of ineligibility.

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that 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.<sup>1</sup>

In the present matter, no new facts are discussed in counsel's latest brief. As in her earlier statements, counsel reiterates the claim that the beneficiary negotiates the rates and duration of contracts for international shipping of commodities. Counsel also maintains that the petitioner's support staff relieves the beneficiary from having to primarily engage in the daily operational tasks and provides quarterly wage reports, which the AAO noted were not previously submitted. However, the facts discussed by counsel are not new; and the quarterly wage reports, which substantiate the employment of a part-time support staff, could have been previously submitted, as they were clearly available both at the time of the appeal and at the time of the first motion. Regardless, the fact remains that based on information conveyed by the petitioner in a document dated February 13, 2003, all three staff members were employed on a part-time basis at the time the Form I-140 was filed.<sup>2</sup> Thus, counsel's statements in her latest brief do not overcome the AAO's prior concerns regarding the

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<sup>1</sup> The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . ." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

<sup>2</sup> The document appears to have been submitted in support of the initial petition and provides the names, position titles, dates of hire, and projected work schedule for each employee identified as the beneficiary's subordinate.

ability of the petitioner's support staff to relieve the beneficiary from having to primarily perform non-qualifying tasks. Moreover, counsel's argument that this information is irrelevant to a determination of the petitioner's eligibility is erroneous. The likelihood that the beneficiary primarily performs duties of a qualifying nature depends, in large part, on the existence of a support staff to perform the necessary, though non-qualifying duties, on a daily basis. The fact that the petitioner's support staff was comprised of part-time employees and subcontractors, who were also providing services on a limited part-time basis, gives rise to doubt as to the petitioner's ability to relieve the beneficiary from having to spend a majority of his time performing non-qualifying tasks. As stated in the AAO's prior decisions, an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The AAO also acknowledges counsel's submission of a percentage breakdown of the beneficiary's various job responsibilities. However, in its dismissal of the appeal, the AAO specifically noted the petitioner's failure to quantify the time the beneficiary spends performing various duties. This information was clearly available prior to the AAO's most recent adverse decision. As such, the percentage breakdown also cannot be deemed a new fact.

Accordingly, based on the discussion provided above, the AAO concludes that the petitioner has failed to meet the requirements of a motion to reopen, as the petitioner has failed to introduce any new facts.

In regard to the petitioner's motion to reconsider, the regulations at 8 C.F.R. § 103.5(a)(3) state, 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 (CIS)] 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.

In the present matter, while the petitioner has introduced prior AAO decisions in which the Forms I-140 filed by the respective petitioners were approved, none of the cited decisions were published. As such, the decisions cited by counsel cannot be deemed as legally binding precedent case law. Furthermore, counsel's interpretation of a professional is unsupported by statute, regulation, or case law. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." **Additionally, as provided in 8 C.F.R. § 204.5(k)(2), the term "profession" includes not only the occupations listed in section 101(a)(32) of the Act but also any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. Counsel's belief that work experience can take the place of the required baccalaureate degree, which at least two of the beneficiary's subordinates do not yet possess, is incorrect and is directly contradicted by the relevant sections of the regulations and the Act.**

Regardless, as indicated above, the regulations at 8 C.F.R. § 103.5(a)(3) require that the petitioner present precedent decisions to support the claim that the prior decision was based on an incorrect application of law

or CIS policy. The unpublished decisions cited in counsel's motion are not considered legally binding precedent decisions and, therefore, do not meet the requirements for a motion to reconsider.

Therefore, both of the petitioner's motions will be dismissed in accordance with 8 C.F.R. § 103.5(a)(4), which states, in pertinent part, that a motion that does not meet applicable requirements shall be dismissed.

As a final note, the proper filing of a motion to reopen and/or reconsider does not stay the AAO's prior decision to dismiss an appeal or extend a beneficiary's previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

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, the petitioner has not sustained that burden.

**ORDER:** The motion is dismissed.