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U.S. Citizenship
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FILE: WAC 98 150 51311 Office: CALIFORNIA SERVICE CENTER Date: 3/20/06

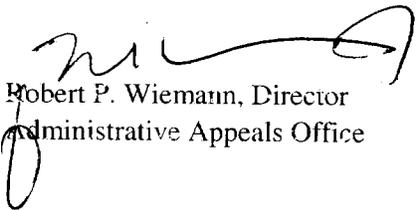
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 petition for a nonimmigrant visa on October 7, 1998. The petitioner submitted an appeal to the Administrative Appeals Office (AAO) on November 4, 1998. The AAO affirmed the director's decision. The petitioner subsequently filed a motion to reopen, dated February 8, 2000. The AAO granted the motion, and affirmed the previous decisions. This matter is now before the AAO on a second motion to reopen and reconsider the AAO's previous decision. The AAO will grant the motion to reopen and reconsider. The previous decisions of the director and the AAO will be affirmed.

The petitioner is an import-export company. It seeks to extend its authorization to temporarily employ the beneficiary in the United States as its general manager. The director determined that the beneficiary had not been and would not be employed in the U.S. entity in a primarily managerial or executive capacity. On appeal, counsel asserted that the beneficiary's employment in the petitioning organization had been and would be in a primarily managerial or executive capacity.

The AAO affirmed the director's decision concluding that the petitioner had provided insufficient evidence to establish the beneficiary's employment in a primarily managerial or executive capacity. The AAO also noted beyond the decision of the director that the petitioner had not demonstrated that it was doing business in the United States or that a qualifying relationship existed between the foreign and U.S. entities.

On motion, counsel submitted additional documentary evidence, and asserted that the new evidence would address the issues raised by the director and the AAO. The AAO concluded that the petitioner had overcome the issues raised by the AAO pertaining to the petitioner doing business in the United States and the existence of a qualifying relationship. The AAO however, affirmed its previous decision that the beneficiary had not been and would not be employed in the United States in a primarily managerial or executive capacity.

On the present motion, counsel states that since the filing of the petition in May 1998, the petitioner has expanded its business and the number of individuals employed. Counsel acknowledges the AAO's correct finding that the beneficiary has not and would not be employed in the U.S. entity in a primarily executive capacity, yet claims that in view of the "new facts" the beneficiary is employed in a primarily managerial position.¹ Counsel also cites three unpublished AAO decisions in which the AAO determined that the small size of the organization was not determinative of whether the beneficiary was functioning in a primarily managerial or executive capacity.

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."

On the issue of the beneficiary's managerial capacity, counsel states that since the filing of the petition, the petitioning organization has "enlarged its operation," and presently employs seven individuals on its payroll. Counsel also notes that KHK pays commissions to nineteen sales representatives or sales supervisors, and that "[m]ore importantly, [the petitioning organization] has acquired the entire ownership and control of KHK Diamond Products Inc." With regard to the organizational structure, counsel states that the beneficiary

¹ The AAO notes that counsel incorrectly requests the beneficiary "be afforded the benefit of immigration under INA 203(b)(1)(C)." The present petition involves classification as a nonimmigrant intracompany transferee under Section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L).

presently has two subordinate managers and four employees. Counsel claims that three of the employees “should be classified as managers since they all managed a division of operation of the organization.”

Counsel has not provided new facts that demonstrate that at the time of filing the petition the beneficiary’s position in the U.S. entity had included and would include primarily managerial duties. Case law establishes that the petitioner must demonstrate the beneficiary’s eligibility for classification as a manager or executive at the time of filing the nonimmigrant visa petition. *Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Id.* In the present matter, while the evidence submitted on motion may be deemed new in terms of describing the current organizational structure of the petitioning organization, it does not include documentation specific to the U.S. entity at the time of filing the petition.

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

A motion to reconsider must state the reasons for the reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [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.

On motion, counsel cites three unpublished AAO decisions. Counsel asserts that in each matter the AAO determined that the beneficiary was employed in a managerial capacity regardless of the small size of the U.S. organization. Counsel’s claim is not supported by the record as counsel has not provided copies of the decisions. Nor has counsel distinguished how these unpublished decisions establish that the AAO’s previous decision was based on an incorrect application of law or CIS policy. The motion therefore does not provide precedent decisions that support a reconsideration of the decision. Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all Citizenship and Immigration Service (CIS) employees in the administration of the Act, unpublished decisions are not similarly binding.

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. Accordingly, the AAO’s previous decision is affirmed.

ORDER: The motion to reopen and reconsider is granted. The previous decision of the AAO is affirmed.