U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 2 4 2004

IN RE: Petitioner: [redacted]
Beneficiary:

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

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The Director, Vermont Service Center, initially approved the employment-based visa petition. Upon subsequent review, the director properly issued a notice of intent to revoke, and ultimately revoked the approval of the petition. The Administrative Appeals Office (AAO) dismissed a subsequently filed appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion to reconsider will be granted and the previous decision of the AAO will be affirmed. The approval of the petition will remain revoked.

The petitioner is a corporation organized in the State of New Jersey in 1996. It purchases, imports, and wholesales pharmaceutical products and medicines. It seeks to employ the beneficiary as its president and 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 approved the petition in December 1998. Upon subsequent review of the record of proceeding, the director observed that the petitioner had employed the beneficiary, a supervisor, secretary, and a sales representative when the petition was filed. The director determined that: (1) the petitioner had not shown that it had sufficient staff to relieve the beneficiary from performing the mundane duties of the organization; and (2) the record did not demonstrate that the preponderance of the beneficiary's duties would be primarily managerial or executive. The director notified the petitioner he would make a final determination on the matter in 30 days, allowing the petitioner 30 days to submit evidence that would overcome the reasons for revocation. The director specifically requested that the petitioner provide complete position descriptions for all the petitioner's employees including a breakdown of the number of hours spent on each job duty to assist in his final determination.

In rebuttal, the petitioner provided position descriptions for the beneficiary, a manager, a sales representative, and an administrative clerk. The petitioner also noted that it used a shipping consultant on a contract basis. The director determined that the petitioner had provided a vague description for the beneficiary's position that did not provide an understanding of the nature and scope of the beneficiary's day-to-day activities. The director observed that the petitioner had elected not to provide an hourly breakdown of the duties of its employees and that the record did not show who performed the duties to support and execute the international trade activities. The director, based on the lack of documentation in the record, presumed that the beneficiary would be engaged primarily in non-managerial, day-to-day operations. The director also determined that the record did not demonstrate that the beneficiary would manage or direct a function.

On appeal, counsel for the petitioner asserted that: (1) the director did not have "good and sufficient" cause to revoke the approved petition, because the director had failed to produce substantial evidence to convincingly disprove the evidence presented in support of the original petition; and, (2) the beneficiary is employed in a managerial and executive capacity. Counsel also submitted a more detailed description of the beneficiary's duties.

The AAO affirmed the director's decision on appeal in its decision dated January 30, 2003. The AAO specifically observed that "a notice of intention to revoke a visa petition is properly issued for 'good and sufficient cause' where the evidence of record at the time the notice is issued, if unexplained and unrebutted,

would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof," citing *Matter of Estime*, 19 I&N 450 (BIA 1987) among other precedent decisions of the Board of Immigration Appeals. The AAO also observed that the petitioner had submitted inconsistent descriptions of the beneficiary's duties, had not reconciled the differences, and had not supported the revised description with documentary evidence. The AAO further observed that much of the petitioner's evidence was irrelevant because it related to the petitioner's circumstances subsequent to filing the petition, noting that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The AAO concluded that the petitioner had not established the beneficiary's eligibility for this visa classification.

On motion, counsel for the petitioner asserts that the notice of intent to revoke was based solely on the size of the petitioner's staff. Counsel contends that the director's review of the record on three prior occasions had resulted in approval of the beneficiary's managerial and executive capacity and that Citizenship and Immigration Services (CIS) had failed to "specifically elucidate" how the three previous adjudications were in error. Counsel cites *Omni Packaging, Inc., et al. v. INS*, 733 F. Supp. 500 (D.C.P.R. 1990) for the proposition that denial of a third preference classification on the same facts as an L-1 visa and extension that were approved is an abuse of discretion without specific elucidation stating why the previous approvals were in error.[1] Counsel also cites *Hong Kong T.V. Video Program, Inc. v. Ilchert,* 685 F. Supp. 712, 715 (N.D. Cal 1988) stating that a decision based on an improper understanding of the law, or not in accordance with substantial evidence is reversible error. Counsel includes numerous documents in connection with the beneficiary, the petitioner's business activities, and the parent company's business activities.

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. The AAO observes that many of the documents submitted have been previously submitted and reviewed by the director and the AAO. Other documents submitted on motion were previously available and could have been submitted but were previously not submitted for review. Additionally, many of the documents submitted are documents created after the petition was filed and thus are not relevant to this proceeding. The petition was filed in August 1998, and a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. at 49. Counsel has not submitted any new facts that are relevant to this proceeding.

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

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[1] Counsel fails to note that the court in *Omni Packaging* revisited the issue and later determined that the Immigration and Naturalization Service had properly denied the immigrant petition and that it was not estopped from finding that the alien was not manager or executive after having determined that he was manager or executive for purposes of issuing an L-1 visa. *See Omni Packaging, Inc. v. INS*, 930 F. Supp. 28 (D.C.P.R. 1996).

> 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 Service 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 asserts that the director was unreasonable when issuing a notice of intent to revoke based solely on the size of the petitioner's staff in light of the petitioner's stage of development. The notice of intent to revoke was not, however, based solely on the size of the petitioner's staff. The director observed that the petitioner had not shown that it had sufficient staff to relieve the beneficiary from performing the mundane duties of the organization and that the record did not demonstrate that the preponderance of the beneficiary's duties would be primarily managerial or executive. The director properly gave the petitioner the opportunity to produce evidence to overcome these grounds. The petitioner did not submit evidence establishing that the beneficiary's assignment was primarily managerial or executive when the petition was filed. Most importantly, the petitioner did not provide detail on the duties of the beneficiary's subordinates so that the director could determine whether the beneficiary would be relieved from performing primarily non-qualifying duties.

Moreover, the AAO observes that 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.* Here, the petitioner had submitted inconsistent descriptions of the beneficiary's duties, had not reconciled the differences, and had not supported the revised description with documentary evidence. Counsel has not provided pertinent precedent decisions to establish that the previous decision was based on an incorrect application of law or policy.

Counsel also questions on motion the director's three previous nonimmigrant petition approvals and contends that the director failed to specifically elucidate how the three previous approvals were in error. First, the AAO notes that this record of proceeding does not contain copies of the nonimmigrant visa petitions that the petitioner claims were previously approved. Second it must be emphasized that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). When making a determination of statutory eligibility, CIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO could attempt to hypothesize as to whether the prior approvals were granted in error, it would be inappropriate to make such a determination without reviewing the original L-1A nonimmigrant petition filings in their entirety. Suffice it to observe, that if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approvals would constitute clear 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, supra.* 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).

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 L1-A 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).

The AAO reviewed the entire record of proceeding in this immigrant petition matter and upon review of the totality of this record determined that the petitioner had not provided sufficient evidence establishing the beneficiary's eligibility when the petition was filed. The AAO noted the inconsistent descriptions and the lack of documentary evidence. Further, the record does not contain evidence that the beneficiary is relieved from performing primarily non-qualifying duties. 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). The initial approval of this immigrant petition was contrary to law and must be considered unmitigated error.

Finally, 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).

The AAO is not persuaded by the decisions cited by counsel. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Counsel has not submitted any pertinent precedent decisions to establish that the AAO decision was based on an incorrect application of law or policy. Counsel has not substantiated that the AAO applied the law inappropriately or used an analysis that was inconsistent with the information presented provided. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. The regulation at 8 C.F.R. § 103.5(a)(4) states "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the previous decisions of the director and the AAO will be affirmed.

Finally, it is noted that, unless CIS directs otherwise, the filing of a motion to reopen or reconsider does not stay the execution of any decision in a case or extend a previously set departure date. *See* 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, that burden has not been met.

ORDER: The previous decision of the AAO, dated January 30, 2003, is affirmed.