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Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 01 297 51449 Office: CALIFORNIA SERVICE CENTER Date: SEP 0 2 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, California Service Center, denied the employment-based visa 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 will be dismissed.

The petitioner is an Arizona corporation. It claims to provide solutions for organizations through telecommunications and information technology. 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 that the beneficiary would be employed in a managerial or executive capacity for the United States entity. The AAO affirmed the director's decision in its decision dated July 3, 2003.

The AAO determined that the petitioner had not clearly defined the beneficiary's role. The AAO noted that without more specific information regarding the beneficiary's duties, the record lacked sufficient evidence to find that the beneficiary directs or manages the petitioner's services rather than performs the tasks necessary to provide the petitioner's services. The AAO specifically noted that the petitioner's job descriptions for its contracted employees did not clarify the role that each individual played within the petitioner's organizational structure and that the petitioner had failed to explain how the services provided by its contracted employees allowed the beneficiary to primarily execute the responsibilities specified in the definition of managerial or executive capacity.

On motion received August 1, 2003, counsel for the petitioner requests that this matter be reopened and reconsidered. Counsel asserts that the AAO decision is in error because it is based on law that was inappropriately applied, the analysis used was inconsistent with the information presented, and new additional information is available to be considered.

Counsel also submits a June 2002 proposal for a USAID project; a July 2002 Broadband summary business plan conceptualized by the beneficiary that includes the coordination of a coalition of partners; a July 2003 proposal to act as liaison between the Port of Antwerp and United States institutions and individuals; and, an August 2002 affidavit signed by the president of an unrelated company attesting that his company had worked with the petitioner and the beneficiary for the last six months on several projects including the USAID project.

Counsel re-states the definitions of managerial and executive capacity, cites an unpublished decision, a district court decision relating to a company's size in evaluating managerial or executive capacity, and a circuit court decision regarding the proposition that an executive's duties are the critical factor, and that a company's size may not be the determining factor unless a company's reasonable needs are also considered.

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 the June 2002 USAID proposal and the July 2002 Broadband business plan were previously available but were not submitted for review. Additionally, counsel had previously submitted the August 2002 affidavit. Thus, these documents are not considered new. Moreover, these documents are not relevant to this proceeding. The petition was filed in September 2001, 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. 45, 49 (Comm. 1971). Although, the July 2003 proposal to act as liaison between the Port of Antwerp and United States institutions and individuals may not have been available on appeal, the proposal serves to substantiate the beneficiary's involvement in providing consulting services to other institutions. Again, a petitioner must establish eligibility at the time of filing, *Matter of Katigbak Id;* and 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).

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. With the current motion, the movant has not met that burden. The motion to reopen will be dismissed.

The regulation at 8 C.F.R. § 103.5(a)(3) 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 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.

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's restatement of the definitions of managerial and executive capacity incorporating assertions that the beneficiary manages essential functions, professional and managerial personnel, and is building the business through advocacy of its products and projects, providing leadership, and establishing policies, plans and goals are not probative. The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Counsel's citation to an unpublished decision is likewise not probative. Unpublished decisions are not binding on Citizenship and Immigration Services (CIS) in its administration of the Act. *See* 8 C.F.R. § 103.3(c).

Counsel's citation to a district court decision and a circuit court decision delving into the subject matter of the relevance of a company's size, a company's reasonable needs, and the critical nature of an executive's duties, are issues addressed by the AAO in the previous proceeding. The AAO acknowledged that, if staffing levels are used as a basis for determining managerial or executive capacity, CIS must take into account the petitioner's reasonable needs. Additionally, the AAO recognized that a beneficiary could be the petitioner's

sole employee. However, the AAO determined that in this matter the petitioner had not clearly defined the beneficiary's role within the organization and had failed to articulate how the contracted employees relieved the beneficiary from primarily providing the petitioner's services. Moreover, it requires emphasis 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).

Finally, counsel's interpretation of the beneficiary's role within the organization is not substantiated with documentary evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 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. at 506. The petitioner submitted a copy of the beneficiary's curriculum vitae with the petition. According to the beneficiary's own resume, when the petition was filed, the beneficiary had held new contact meetings, was negotiating for the petitioner to become an exclusive market representative for an unrelated company, was proposing a service level agreement for a client, and was leading a project to introduce a Belgium firm to the United States market. These duties reveal that the beneficiary's assignment, when the petition was filed, was to primarily provide the petitioner's sales and consulting services.

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 motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

Finally, it should be noted for the record 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 motion is dismissed.