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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 01 294 54423 Office: CALIFORNIA SERVICE CENTER Date: MAR 03 2006

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

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The appeal was dismissed. The matter is now before the AAO on motion to reopen and reconsider. The motion will be dismissed.

The petitioner is an Indiana corporation engaged in the business of importing and wholesale of granite, marble, and natural stone. It seeks to employ the beneficiary as its tile product manager. 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 concluding that the petitioner failed to establish that the beneficiary had been employed abroad and would be employed in the United States in a managerial or executive capacity.

The petitioner appealed the denial disputing the director's findings. The AAO reviewed the record in its entirety and affirmed the director's decision. Specifically, the AAO discussed the beneficiary's foreign employer's organizational structure, as well as the duties of the beneficiary and his subordinates and concluded the beneficiary was primarily performing daily operational tasks. While acknowledging that the beneficiary had duties other than those directly related to his buying responsibilities, the AAO concluded that "the petitioner has not substantiated that the other duties were the beneficiary's primarily focus."

In regard to the beneficiary's proposed position in the United States, the AAO relied heavily on the petitioner's description the beneficiary's duties in determined that the beneficiary would spend a majority of his time on daily operational tasks rather than qualifying managerial or executive tasks. The AAO further acknowledged counsel's indication that the beneficiary would manage be a function manager by virtue of managing the petitioner's tile division function. However, the AAO concluded that that the petitioner did not submit sufficient evidence to support this claim.

Finally, the AAO explained why it could not rely on prior approvals of the petitioner's non-immigrant petitions to approve an immigrant visa petition in which the petitioner failed to meet its burden of proof. 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). 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).

On motion, counsel requests that the matter be reopened and reconsidered referring to the petitioner's financial progress and the role that the beneficiary has played in realizing such success.

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.

While the petitioner's continued financial progress may be deemed a new fact, precedent case law has established that 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). Based on this reasoning, the petitioner's newly updated organizational chart, which has been submitted in support of the motion, also cannot be considered in determining the petitioner's eligibility, as it clearly does not reflect the petitioner's organizational structure or the beneficiary's position at the time the petition was filed in September of 2001. In comparing the newly submitted organizational chart with the one submitted in response to the director's request for additional evidence, the latter chart shows significantly fewer subordinates in the United States and significantly fewer positions within the beneficiary's division. Thus, while the petitioner may be eligible under the current set of facts, this fact is irrelevant for the purpose of determining the petitioner's eligibility for a petition that was filed in 2001.

In regard to a 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 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 instant matter, counsel has provided the professional opinion of Professor to support the claim that the beneficiary's positions abroad and in the United States are both within a managerial capacity. However, counsel does not cite any legal precedent or applicable law that would indicate an error on the part of the AAO in dismissing the petitioner's appeal based on the record of proceeding at the time of the AAO's decision. The opinion of Professor [redacted] does not establish that the previous decision of the AAO was based on an incorrect application of law or CIS policy. Instead, the letter states an opinion that is not based on a review the immigration statute or the applicable regulations. The textbook or common understanding of business terms will not supersede the statutory definitions; the applicable definition of manager and executive are contained in the statute at sections 101(a)(44)(A) and (B) of the Act.

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Since the opinion offered here is not based on the critical statutory definitions, the opinion is not found to be persuasive.

Therefore, the motion to reopen and reconsider 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.

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.