U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

B4

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 1 6 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Erica Hallden

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant petition. The petitioner subsequently filed a motion to reopen or reconsider. The director dismissed the motion based on a finding that it did not meet the relevant regulatory requirements at 8 C.F.R. § 103.5. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed a Form I-140, Immigrant Petition for Alien Worker, on July 27, 2007. The petitioner indicates that it operates a retail shoe store and seeks to employ the beneficiary as its manager. Under Part 2 of the Form I-140, the petitioner checked box "c" for petition type, indicating that it sought to classify the beneficiary as a "multinational executive or manager," an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1153(b)(1)(C). The record does not show that any initial supporting evidence was submitted with the Form I-140.

On November 17, 2008, the director denied the petition on the grounds that the petitioner had failed to submit the initial evidence required in connection with a petition filed under section 203(b)(1)(C) of the Act. Specifically, the director noted that the petitioner failed to submit the initial evidence required by the regulations at 8 C.F.R. § 204.5(j)(3)(i). The director also found the petitioner failed to submit evidence of its ability to pay the beneficiary's proffered wage, pursuant to 8 C.F.R. § 204.5(g)(2). Therefore, the director concluded that the petitioner has failed to establish the beneficiary's eligibility for classification as a multinational executive or manager under section 203(b)(1)(C) of the Act.

The petitioner filed a motion to reopen and reconsider on December 15, 2008, which was based on the following claims: (1) the petitioner erroneously designated the petition type as "multinational executive or manager" rather than "other worker"; (2) the petitioner submitted an approved labor certification application with the Form I-140 which should have led the director to seek clarification as to the requested immigrant visa classification; and (3) the director failed to follow U.S. Citizenship and Immigration Services (USCIS) policy by failing to issue a request for evidence or notice of intent to deny before adjudicating the petition.[1] Finally, counsel submitted an amended Form I-140, on which "other worker" is checked as the requested classification, along with supporting documentation. The AAO notes that this documentation did not include a copy of the beneficiary's approved labor certification application, but rather only an unexecuted copy of the application. Counsel claimed that the amended and supplemented petition should demonstrate the

[1] In support of this claim, counsel cited to two USCIS memoranda pertaining to the issuance of requests for further evidence and notices of intent to deny. [redacted] USCIS Associate Director of Operations, *Requests for Evidence (RFE) and Notice of Intent to Deny (NOID)* (February 16, 2005) and Memorandum of [redacted]

beneficiary's eligibility for classification as an "other worker" under Section 203(b)(3)(A)(iii) of the Act.

The director dismissed the petitioner's motion to reopen and reconsider on January 23, 2009, concluding that the petitioner failed to meet the requirements for the grant of a motion as set forth at 8 C.F.R. § 103.5(a).

The petitioner filed the instant appeal on February 25, 2009. Counsel reiterates the arguments made in support of the motion, and further contends that "the Service erred in not reopening the I-140 for adjudication after the motion was timely submitted with an amended petition, complete with the requisite supporting documentation along with assertions and evidence of an approved LC." Counsel cites to the unpublished AAO decision previously submitted with and discussed in the petitioner's motion. Counsel claims that the amended petition with new supporting documentation is sufficient to establish the beneficiary's eligibility as an "other worker" under Section 203(b)(3)(A)(iii) of the Act. Finally, counsel asserts that the petitioner was unable to address the issue of the missing labor certification in a timely manner as it was operating under the "certain belief that the original [labor certification] was with the Service."

Upon review, the AAO concurs with the director's decision that the petitioner has failed to establish eligibility for the immigrant classification stated on the petitioner's Form I-140 and further finds that the director has properly dismissed the petitioner's motion to reopen and reconsider.

I. The Law

Section 203(b) of the Act states, in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
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> * * *
>
> > (C) Certain Multinational Executives and Managers. – An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives or managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary. No labor certification is required for this classification. The prospective

employer in the United States must furnish a job offer in the form of a statement, which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5). The regulation at 8 C.F.R. § 204.5(j)(3)(i) indicates that the required initial evidence includes a statement from an authorized official of the petitioning United States employer which demonstrates:

> (A) If the alien is outside the U.S., in the three years immediately preceding the filing of the petition, the alien has been employed outside the U.S. for at least on year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity: or
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> (B) If the alien is already in the U.S. working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed bv the entity abroad for at least one year in a management or executive capacity;
>
> (C) The prospective employer in the U.S is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
>
> (D) The prospective U.S. employer has been doing business for at least one year.

The regulation at 8 C.F.R. § 103.2(b)(8)(ii), the revision of which went into effect on June 18, 2007, states:

> If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

II. Discussion

A. *The Petition and Denial*

The petition filed the Form I-140, Immigrant Petition for Alien Worker, on July 27, 2007. As noted above, where asked to indicate the petition type on the Form I-140, the petitioner marked box c, "A multinational executive or manager." The petitioner indicated at Part 6 that the beneficiary's proposed job title is "manager," and provided a brief description of job duties typical of a retail manager.

The record shows that the petitioner filed the Form I-140 and filing fee by certified mail in a standard letter-sized envelope with no supporting documentation. The AAO notes that the Form I-

140 specifically requests that the petitioner provide the DOL/ETA Case Number under Part 5 if the petition is one which requires an approved labor certification. The petitioner left this item blank.

The director denied the petition on November 17, 2008 based on the petitioner's failure to submit the required initial evidence pursuant to 8 C.F.R. §§ 204.5(g)(2) and 204.5(j)(3)(i). The director relied on the discretionary authority granted to him by 8 C.F.R. § 103.2(b)(8)(ii), which provides that USCIS may deny a petition for lack of initial evidence. The director's decision to deny the petition based on the lack of initial evidence was clearly within his discretionary authority and was therefore appropriate.

While the director could have requested the required initial evidence for the requested classification, he was under no obligation to do so. Further, the petitioner has since conceded that the beneficiary did not qualify under the requested classification. Had the director requested the required initial evidence for a multinational manager or executive, the petitioner could not have established the beneficiary's eligibility.

Finally, even assuming, *arguendo*, that the petitioner had requested the correct classification on the Form I-140, it would have been within the director's discretionary authority to deny the petition based on lack of initial evidence. In order to establish the beneficiary's eligibility as an "other worker," the petitioner must provide evidence of its ability to pay the proffered wages, a labor certification from the department of labor, and evidence that the beneficiary meets the educational, training, experience and other requirements of the labor certification. *See* 8 C.F.R. §§ 204.5(g)(2), 204.5(l)(i) and 204.5(l)(ii)(D). The petitioner has not established that any of this evidence was submitted.

B. *The Petitioner's Motion and Appeal*

The petitioner filed a motion to reopen and reconsider on December 15, 2008. The motion was accompanied by the following: a brief from counsel; an amended Form I-140 in which the petitioner requested the "other worker" classification and provided the beneficiary's DOL/ETA case number; an unexecuted and uncertified copy of the beneficiary's DOL Form ETA 750, Application for Alien Labor Certification; a letter from the beneficiary's prior employer confirming his work experience; the beneficiary's resume prepared in 2008; and evidence of the petitioner's ability to pay the beneficiary's wages.

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.

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.[2]

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[2] 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).

With respect to the 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 [USCIS] 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 for the petitioner claimed that the petitioner prepared and filed the Form I-140 without the assistance of counsel, and due to its "lack of sophistication or understanding," marked the "multinational executive or manager" (box "c") rather than "other worker" (box "g") classification. Counsel further claimed that, along with the Form I-140, the petitioner had submitted a labor certification certified by the Department of Labor. Counsel contended that USCIS must have received the labor certification because the petitioner's name and address were left off the Form I-140, thus USCIS must have relied on the labor certification for that information.[3] Therefore, counsel asserted that USCIS was aware of a discrepancy with respect to the requested classification, because the petitioner submitted a labor certification, yet requested classification of the beneficiary in a preference which requires no labor certification. Counsel relied on an unpublished AAO decision to stand for the proposition that "an obvious error in designating the correct preference category constitute[s] sufficient grounds to reopen a denial of a Form I-140."

Counsel further claimed that the petitioner's motion to reconsider should be granted as USCIS failed to apply its policy correctly in denying the petition without issuing a request for evidence or a notice of intent to deny. In support of this claim, counsel cited to the two above-referenced USCIS memoranda issued in February 2005 and June 2007.

The director dismissed the petitioner's motion to reopen and reconsider on January 23, 2009. The director found that the petitioner failed to cite to pertinent precedent decisions establishing that the decision was based on an incorrect application of law or policy, or that the decision was incorrect based on the evidence of record at the time of the initial decision. Further, the director noted that, contrary to the petitioner's claim, the record contained no labor certification or related documentation, nor did the petitioner provide any new evidence that could not have been submitted with the initial filing. Therefore, the director concluded that the petitioner failed to meet the requirements for the grant of either a motion to reopen or a motion to reconsider, and the director's decision dated November 17, 2008 remained undisturbed.

On February 25, 2009, the petitioner filed the instant appeal. On appeal, counsel for the petitioner argues that the director erred by failing to take into account the fact that the petitioner actually submitted the original approved labor certification with the Form I-140. Counsel insists that the "original [labor certification] is in the possession of [USCIS] and if it is not in the file, then [USCIS]

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[3] The AAO notes that the Form I-140 does in fact include the name and address of the petitioner.

has lost the [labor certification]." Counsel claims that the "only mistake made [by the petitioner] in filing was checking the wrong box on Part 2 of the application." Counsel contends that the fault must lie with USCIS in that "it is completely conceivable that the Service lost the original [labor certification] as it receives thousands of documents daily that can easily be and are misplaced and lost." Counsel submits a copy of the labor certification application with a certification date of April 9, 2007 and a declaration dated March 23, 2009 by [redacted], the petitioner's president, who states that the petitioner "consulted with the instructions for the I-140 and mailed the application with the original approved labor certification and a check for the filing fees."

Counsel further contends that USCIS also erred by "abusing its discretion and violating fundamental fairness in summarily denying the I-140 one year and four months after its filing, resulting in the expiration of the [labor certification]'s validity period, the loss of eligibility under INA §245(i) and the loss of the April 30, 2001 priority date." Counsel cites to and resubmits the USCIS memoranda on the issuance of requests for evidence and notices of intent to deny and discussed in the petitioner's motion. Counsel claims that had USCIS issued a notice, it "would have alerted the petitioner to the 'lost [labor certification]' and incorrect selection of the classification and given the Petitioner an opportunity to correct and clarify the issues."

In addition, counsel argues that "the Service erred in not reopening the I-140 for adjudication after the motion was timely submitted with an amended petition, complete with the requisite supporting documentation along with assertions and evidence of an approved LC." Counsel again cites to the unpublished AAO decision previously submitted with and discussed in the petitioner's motion. Counsel claims that the amended petition with new supporting documentation is sufficient to establish the beneficiary's eligibility as an "other worker" under Section 203(b)(3)(A)(iii) of the Act. Counsel asserts that the petitioner was unable to address the issue of the missing labor certification in a timely manner as it was operating under the "certain belief that the original [labor certification] was with the Service."

Upon review, the AAO concurs with the director's decision that the petitioner has failed to establish eligibility for the immigrant classification stated on the petitioner's Form I-140 and further finds that the director has properly dismissed the petitioner's motion to reopen and reconsider.

First, the AAO recognizes that counsel's claim on appeal is premised on the petitioner's and counsel's claim that a labor certification was submitted with the initial Form I-140. However, nothing in the record indicates that a labor certification from the U.S. Department of Labor was indeed submitted with the Form I-140 or at any time prior to the instant appeal. Contrary to counsel's claim, the fact that USCIS knew the name and address of the petitioner is not an indication that the labor certification was in the record, as the petitioner actually provided that information on the I-140. Counsel's assertion that the USCIS must have received and lost the beneficiary's labor certification because "it receives thousands of documents daily that can easily be and are misplaced and lost" is nothing more than pure conjecture. The unsupported 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).

The AAO notes that the petitioner submitted a declaration from its president, stating that the petitioner "consulted with the instructions for the I-140 and mailed the application with the original approved labor certification and a check for the filing fees." However, this declaration does not suffice as evidence that the labor certification was actually mailed with the Form I-140. The declaration is not an affidavit as it was not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who, having confirmed the declarant's identity, has administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, does it contain the requisite statement, permitted by Federal law, that the signer, in signing the statements, certifies the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. Such unsworn statements made in support of a motion are not evidence and thus, as is the case with the arguments of counsel, are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. at 188-89; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 503.

Even if the AAO were to accept [redacted] declaration on its face, her statements are still insufficient evidence that a labor certification was indeed submitted with the initial petition. [redacted] states that the petitioner "consulted with the instructions for the I-140" prior to mailing the petition. However, if the petitioner in fact followed instructions on the Form I-140 for the preference type that was checked, *i.e.* "multinational executive or manager," then it would not have submitted the labor certification as none is required for that category. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Based on the evidence submitted, the petitioner has not shown that at the time the petition was filed, it was meant to be anything other than a Form I-140 petition for classification of the beneficiary as a "multinational executive or manager." The petitioner did not provide the beneficiary's DOL/ETA Case Number on the Form I-140 or submit the beneficiary's labor certification from the Department of Labor. Therefore, the petitioner's claim that the director should have noted a discrepancy in the submitted evidence and sought clarification from the petitioner is unpersuasive. Absent any indication in the initial petition that the petition type was anything other that of "multinational executive or manager," the director acted within his discretion in denying the petition for lack of required initial evidence specific to that petition type, without further notice to the petitioner, as discussed above.

Even assuming, *arguendo*, that the petitioner had chosen the "other worker" classification on the Form I-140, the director's decision to deny the petition based on failure to provide required initial evidence still would be appropriate since the initial petition was not accompanied by, and the petitioner failed to show that it did in fact submit with the initial petition, a labor certification as required under 8 C.F.R. § 204.5(l)(3)(i).

Counsel relies on two USCIS memoranda in support of the contention that USCIS should have issued a request for evidence or notice of intent to deny prior to denying the petition. However, the AAO notes that the memoranda in question were dated February 16, 2005 and June 1, 2007,

respectively, and therefore were superseded by the revised regulations at 8 C.F.R. § 103.2(b)(8)(ii), which were implemented on June 18, 2007 and in effect at the time this petition was filed in July 2007. Further, with regards to counsel's assertion that a request for evidence or notice of intent to deny "would have alerted the petitioner to the 'lost [labor certification]' and incorrect selection of the classification and given the Petitioner an opportunity to correct and clarify the issues," counsel is reminded that 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. As noted earlier, the Form I-140 on its face gave USCIS no indication that there were material errors, whether or not inadvertent, in the petition requiring rectification prior to adjudication.

The AAO further finds unpersuasive counsel's claim that the director's denial of the petitioner's motion to reopen or reconsider is in error.

The petitioner's motion to reopen was premised on the existence and purported previous submission of a labor certification which was certified on April 9, 2007. This date, along with the petitioner's claim that the labor certification was submitted with the initial petition, demonstrates that the labor certification was available and could have been presented at the time the petition was filed. Furthermore, the petitioner's motion to reopen did not include a copy of a labor certification certified by the Department of Labor. The petitioner submitted an unexecuted copy of the application in support of the motion. At most, the evidence submitted on motion established that a labor certification application had been filed on the beneficiary's behalf.

Similarly, the amended petition and supporting evidence consist of information and documentation that predate the filing of the initial petition, and therefore would have been available at the time of the initial filing. As such, the evidence submitted to the director on motion could not have been considered "new," and consequently the petitioner has failed to meet the requirements of a motion to reopen under the regulation at 8 C.F.R. § 103.5(a)(2).

With respect to the motion to reconsider, as previously discussed, counsel has not demonstrated that the director's decision to deny the petition was based on an incorrect application of law or USCIS policy. Counsel cites to USCIS policy memoranda that were superseded by regulation prior to the filing of the instant petition. Counsel cites to and submits an unpublished AAO decision in support his argument that the director erred in refusing to reopen the petition for adjudication based on the amended petition submitted on motion. However, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Further, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision, nor does a review of the unpublished decision itself reveal analogous facts. As such, the director appropriately determined that the petitioner failed to meet the requirements of a motion to reconsider.

The regulations at 8 C.F.R. § 103.5(a)(4) states, in pertinent part, that a motion that does not meet applicable requirements shall be dismissed. Accordingly, the director's decision to dismiss the petitioner's motion to reopen and reconsider was appropriate.

The AAO acknowledges that the record as presently constituted contains the beneficiary's labor certification from the Department of Labor, evidence of his qualifications under the "other worker" preference category, and evidence of the petitioner's ability to pay the proffered wage. However, the fact remains that the petitioner requested that the beneficiary be granted classification as a multinational manager or executive at the time the petition was filed. As stated above, counsel's assertion on motion and again on appeal is that USCIS should accept an amended petition executed after the petition was denied because the petitioner prepared the initial petition without the assistance of counsel and believed that it had selected the appropriate category for a "manager." The purposes of appeals and motions are set forth in the regulations at 8 C.F.R. §§ 103.3 and 103.5. These regulations do not afford the petitioner the opportunity to submit new or amended petitions to correct its own admitted error.

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. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r. 1998). Counsel is not persuasive in arguing that the amended petition changing the requested employment-based preference category does not constitute a material change. A material fact is one that is "significant or essential to the issue or matter at hand." Black's Law Dictionary 611 (7th ed. 1999). In general, material means "of such a nature that knowledge of the item would affect a persona's decision-making process." *Id.* at 991. We find that the requested preference category is significant and impacts the adjudication of the petition, and is thus material to the processing of the case.

In order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey*, 541 F.3d 257, 261 (4th Cir. 2008). Regardless of why the petitioner selected the "multinational executive or manager" classification on the Form I-140, the petition did not meet the regulatory requirements for approval on the date it was filed, and the petitioner concedes that the beneficiary is not eligible under the requested classification. As such, the petition may not be approved.

The petition will be denied, and the appeal will be dismissed, for the above stated reasons. 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 appeal is dismissed.