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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office
DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner subsequently filed a motion to reconsider, which the director dismissed. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Massachusetts corporation seeking to employ the beneficiary as its pre-sales global account 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 determined that the petitioner did not have a qualifying relationship with the beneficiary's foreign employer at the time the Form I-140 was filed and is therefore ineligible for the immigration benefit sought in the present matter.

On appeal, counsel disputes the director's denial of the motion and the underlying decision denying the petition. Counsel submits a brief in support of his assertions. Counsel requested oral argument in this matter. Counsel's arguments have been adequately addressed in writing; accordingly, counsel's request for oral argument is denied.

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):

* * *

(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 and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. 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.

The primary issue in this proceeding is whether the petitioner is precluded from obtaining the immigration benefit sought herein in light of the fact that the petitioner's qualifying relationship with the beneficiary's foreign employer was severed prior to the time the petitioner filed the Form I-140.
The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

*Affiliate* means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

* * *

*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

*Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In support of the Form I-140, the petitioner provided a letter dated March 22, 2007 stating that it currently has wholly-owned subsidiaries in Canada, the United Kingdom, Mexico, and Australia. The petitioner further stated that, the beneficiary's foreign employer, was one of the petitioner's wholly-owned subsidiaries during the beneficiary's employment abroad. However, the petitioner disclosed that in the spring of 1999 it sold its ownership interest in the beneficiary's foreign employer to, a South African company, which employed the beneficiary directly prior to his current employment with the petitioning entity. It is noted that the petitioner made no claim to having any affiliation with the entity that purchased its ownership interest in

On May 28, 2008, the director issued a request for evidence (RFE) in which he instructed the petitioner to submit, *inter alia*, evidence establishing the existence of a qualifying relationship between the petitioner and the beneficiary's foreign employer leading up to the petitioner's sale of its ownership interest in the foreign entity to an unaffiliated entity.

In response, the petitioner provided the requested documentation, which established that the beneficiary's foreign employer and the petitioner had a qualifying relationship until March 1999 at which time, a South African corporation, acquired the petitioner's ownership interest in

The petitioner provided a document entitled "Sale of Shares Agreement," dated March 5, 1999, as evidence of the petitioner's sale of to

It is noted that the petitioner's earlier reference to as the entity that purchased the petitioner's ownership interest in appears to be a typographical error, as there is evidence that identifies as the purchaser of . While may have employed the beneficiary prior to his employment with the U.S. entity, there is no evidence to indicate that are the same entity or that they are related entities.
Nevertheless, in a decision dated September 11, 2008, the director denied the petitioner's Form I-140, concluding that the petitioner did not have the requisite qualifying relationship with the beneficiary's foreign employer at the time the Form I-140 was filed.

Counsel's argument, both on motion and on appeal, is that the director erroneously interpreted Congress's intent with regard to sections in the Code of Federal Regulations that address nonimmigrant petitions for intracompany transferees as well as 8 C.F.R. § 204.5(j)(2), which applies directly to the type of immigrant petition filed in the present matter. More specifically, counsel maintains that none of the relevant provisions require that the petitioner and the beneficiary's foreign employer have a qualifying relationship at the time of filing. Counsel also points to the approval of a Form I-129 petition to employ the beneficiary in the L-1A nonimmigrant visa category despite the fact that the beneficiary's foreign employer was no longer affiliated with the petitioner at the time the nonimmigrant petition was filed. Counsel suggests that the approval of the nonimmigrant visa petition was an indication that U.S. Citizenship and Immigration Services (USCIS) accepts the petitioner's status as a multinational entity based on the petitioner's continued operation of its foreign affiliates. Counsel also cites Matter of Chartier, 16 I&N Dec. 284 (BIA 1977) and Matter of Thompson, 18 I&N Dec. 169 (1981), each of which involved a petitioner seeking approval of an L-1A nonimmigrant visa petition for one of its employees.

In reviewing counsel's arguments, the AAO finds that the director's determination in the denial was properly made and need not be withdrawn.

First, counsel's repeated references to regulations pertaining to L-1A nonimmigrant petitions are irrelevant in the present matter, where the petitioner seeks to employ the beneficiary permanently in an immigrant classification. While the AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity, the regulations that apply to each type of classification are distinct and are not interchangeable as counsel's arguments suggest. See §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). For example, the multinational immigrant regulations at 8 C.F.R. § 204.5 require that a petitioner be a "United States employer" and that this employer establish its ability to pay the proffered wage. See 8 C.F.R. § 204.5(g)(2) and 204.5(j)(1). In addition, L-1B specialized knowledge employees are not eligible for an immigrant visa under section 203(b)(1)(C) of the Act.

Moreover, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The approval of a nonimmigrant petition in no way guarantees that USCIS will approve an immigrant petition filed on behalf of the same beneficiary, particularly where the assertions brought forth by the petitioner, as in the present matter, indicate that an approval of the petition would constitute material 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 a prior approval that may have been erroneous. See, e.g. Matter of Church Scientology International, 19 I&N Dec. 593, 597 (Comm. 1988). 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).

Second, with regard to the Board of Immigration Appeals' (BIA) interpretation of Matter of Chartier in its Matter of Thompson decision, which resulted in the approval of an L-1A nonimmigrant visa petition despite the ceased operations of the petitioner's foreign parent entity, counsel's reliance on Matter of Thompson is not persuasive. Legacy Immigration and Naturalization Service (INS) found the decision in Thompson to be an
inappropriate application of the holding in Matter of Chartier, 16 I&N Dec. 284 (BIA 1977) and overturned that decision by regulation. 52 Fed. Reg. 5738, 5741 (Feb. 26, 1987). Counsel also refers to the supplemental information in a final rule published in the Federal Register in support of the assertion that there is no regulation that requires the continued existence of the beneficiary’s foreign employer so long as the petitioner is able to establish that it is actively engaged in business in the United States and at least one other country. See Brief in Support of Appeal of Denial of I-140 Immigrant Visa Petition, p. 12. However, it appears that counsel has misconstrued both the supplemental information found in 52 Fed. Reg. 5738 (Feb. 26, 1987) and the holding in Matter of Chartier.

In Matter of Chartier, the alien beneficiary’s employer in Canada and his employer in the United States are one and the same. 16 I&N Dec. at 284–285. While the employer in Matter of Chartier may not continue to employ anyone in Canada, neither the employer nor the employer’s qualifying relationship with the petitioner ceased to exist and, as such, it can be distinguished from the matter currently before the AAO, where the qualifying relationship with the foreign and U.S. employers was undoubtedly severed when the petitioner sold its interest in the foreign entity. Counsel appears to confuse this issue, i.e., the continued existence of the beneficiary’s employer abroad, with the separate issue of whether the “qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.” 8 C.F.R. § 204.5(j)(2) (definition of “Multinational”). Thus, while it is agreed that Matter of Chartier, 16 I&N Dec. 284 (BIA 1977), was not overturned, counsel’s reliance on the precedent decision in the current matter is misplaced. The AAO further points out that Matter of Chartier is a removal decision regarding an alien beneficiary previously granted L-1A nonimmigrant status, not an alien beneficiary of an immigrant preference petition. Thus, the precedent decision can be distinguished from the instant case based on this additional fact.

As the current regulation at 8 C.F.R. § 204.5(j)(3)(C) clearly indicates, an intracompany transferee may be employed by the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas. Thus, a qualifying relationship of some type must exist at the time of filing, whether it is one of parent-subsidiary, affiliate, or the same employer. This interpretation is consistent with both the current regulations and with Matter of Chartier.

Although counsel recognizes that regulatory changes that have occurred since 1977 when the Matter of Chartier decision was issued, he argues that the holding in the precedent decision allows for situations where the foreign employer ceases to have a qualifying relationship with the petitioner so long as the petitioner is able to establish that it continues to do business in the United States and at least one location abroad. See Motion to Reconsider Denial of I-140 Immigrant Visa Petition, p. 5. In support of this assertion, counsel points to advisory correspondence concerning the issue of an ongoing qualifying relationship. See Letter from [redacted] the State Department’s Chief of Advisory Opinions Division in the Visa Services Section (November 17, 1992). The AAO notes, however, that the State Department does not determine matters dealing with eligibility for an immigrant visa petition. Issues of eligibility, as in the present matter, are within the jurisdiction of the Secretary of Homeland Security, who delegates her authority to administer the Act to USCIS. The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in her through the Homeland Security Act of 2002, Pub. L. 107-296. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003), with one exception - petitions for approval of schools and the appeals of denials of such petitions are now the responsibility of Immigration and Customs Enforcement.
Moreover, there is no evidence that the advisory letter to which counsel refers and the AAO's current opinion are inconsistent, as the letter clearly points out the overruling of Thompson and the fact that a foreign employer must continue to be operational in order to meet eligibility requirements. See id.

In this matter, it is recognized that the petitioner continues to conduct business in two or more countries, one of which is the United States. However, the issue here is not whether the petitioner meets the definition of multinational under 8 C.F.R. § 204.5(j)(2), but whether it maintained (at the time the petition was filed) and continues to maintain a qualifying relationship with the separate legal entity that employed the beneficiary abroad. The current regulations expressly state that the petitioner must establish the beneficiary's "prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity" which employed the beneficiary abroad. 8 C.F.R. § 204.5(j)(3)(i)(C). The AAO notes that the regulation's use of the word "is" prescribes that the relationship between the petitioner and the beneficiary's foreign employer must exist in the present, i.e., at the time of filing, and continue to exist until such time as the beneficiary is granted an immigrant visa or adjusts status to that of a permanent resident of the United States. The petitioner's burden of establishing eligibility for the benefit sought is not discharged until the immigrant visa is issued. Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman, 736 F.2d 1305 (9th Cir. 1984).

In direct contradiction to the express language in the relevant regulatory provision, counsel's reasoning focuses on the petitioner's circumstances prior to the filing of the Form I-140, thereby suggesting that eligibility need not be present at the time of filing so long as the petitioner established that it met the relevant regulatory provisions at some other time. This line of reasoning suggests that once a qualifying relationship is established as having existed, the petitioner can continue relying on that old qualifying relationship for a petition filed in the future, even if the relationship has ceased to exist at the time of filing, as is the case in the present matter. The AAO cannot, however, adopt counsel's interpretation. Precedent case law specifically requires that each petitioner establish its eligibility at the time of filing. Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971).

The facts presented by the petitioner in this matter indicate that the circumstances that would have rendered the petitioner eligible for the immigration benefit sought did not occur contemporaneously with the filing of the Form I-140. Rather, by the time the petitioner filed the Form I-140, it was longer eligible for the immigration benefit it was seeking by virtue of the severed relationship between the petitioner and the beneficiary's foreign employer. It would be factually impossible for the petitioner to establish an ongoing qualifying relationship with a foreign entity that the petitioner that the petitioner sold years prior to filing the employment-based immigrant petition. Accordingly, as the petitioner did not have a qualifying relationship with the beneficiary's foreign employer at the time the Form I-140 was filed, this petition cannot be approved.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.