

U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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File: WAC 04 166 51216 Office: CALIFORNIA SERVICE CENTER Date: **NOV 2**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

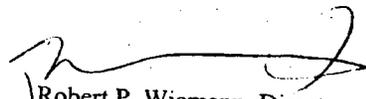
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



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 Director, California Service Center, denied the petition for a nonimmigrant visa. This matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend its authorization to employ its chief executive officer as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a California sole proprietorship established by the beneficiary in 2003 that engages in computer repair services and purchase and sale of computer parts. The petitioner claims that it is the affiliate of [REDACTED] Accesorios Servicios, located in Mexicali, Mexico. The beneficiary was initially granted a one-year period in which to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay for a two-year period.

The director denied the petition concluding that the petitioner did not establish that: (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or that (2) the petitioner is a qualifying organization. The director noted that the petitioner, as a sole proprietorship, is not a legal entity separate from the beneficiary, and is therefore not a U.S. employer for immigration purposes.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion to reconsider and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary supervises and directs the performance of three professionals. Counsel further asserts that the statute was intended to limit managers or executives to persons who supervise large organizations, and notes that the director should also consider independent contractors supervised by the beneficiary. With respect to the director's determination that the petitioner is not a qualifying organization, counsel claims that the petitioner is "in the process of becoming a Corporation." Counsel submits a brief and additional evidence in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for a continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first issue in the present matter is whether the beneficiary will be employed by the United States entity in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as a assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a May 19, 2004 letter appended to the initial petition, the petitioner described the beneficiary's duties follows:

[The beneficiary's] responsibilities are those of reviewing the performance and activities of other professionals and administrative staff, implementing corporate policies and professional standards. [The beneficiary] also negotiates contracts with American businesses that seek to either purchase or sale [sic] computers and computer parts. . . .

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[The beneficiary's] responsibilities as Chief Executive Officer shall include the overall supervision and direction of this business. The employees and independent contractors shall report directly to him. . . .

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The position of Chief Executive Officer of this particular business requires a person to be responsible for corporate financial planning, marketing and promotional strategy, for

negotiating contracts and for making high level decisions involving technical, legal and fiscal matters.

The petitioner indicated on Form I-129 that it had two employees at the time of filing. The petitioner submitted an organizational chart identifying the beneficiary in the roles of chief executive officer "sales," a software developer, an external contractor who provides internet/web design services, and an external accounting office. The petitioner also submitted two pay statements confirming the employment of the "software developer" on a part-time basis during the month of April 2004.

Counsel indicated in his May 19, 2004 cover letter that the beneficiary "does computer repairs on computer mainframes, minis and micros, peripheral equipment, and work [sic] processing systems," reviews performance of other professionals and administrative staff, implements corporate policies, and negotiates contracts with banks, suppliers, clients, and independent contractors.

On June 14, 2004, the director requested additional evidence to establish that the beneficiary will be employed in a managerial or executive capacity. Specifically, the director requested: (1) a more detailed description of the beneficiary's duties, the percentage of time he devotes to each of the listed duties, and titles and position descriptions for all employees under his supervision; (2) copies of California Forms DL Quarterly Wage and Withholding Report, for the last two quarters that were accepted by the State of California; (3) copies of the U.S. company's payroll summary, Forms W-2, and Forms W-3 evidencing wages paid to employees; (4) a list of the specific goals and policies established and discretionary decisions exercised by the beneficiary during the previous six months; and, (5) a specific day-to-day description of the duties the beneficiary has performed over the last six months.

In a response dated June 29, 2004, the petitioner indicated that the beneficiary's daily activities include technical jobs (20 percent); purchasing (15 percent); customer service (15 percent); sales (20 percent); administration/planning (10%); Mexico office (10%); and systems analysis/design (10%). In response to the director's request for a specific description of the beneficiary's day-to-day duties, the petitioner indicated that the beneficiary would:

- Manage people and financial resources of the operation to maximize [sic] value added and minimize [sic] costs.
- Contribute to the development and integration of new systems and processes to enable the growth objectives of the business.
- Establish and monitor appropriate measurement criteria, making improvements where needed.
- Establish revenue forecasts for maintenance contracts, license software implementations and professional service billings.
- Negotiate Software license agreements and professional service contracts with end user customers.
- Review and approve company expenditures.
- Strategic planning and execution to enhance profitability, productivity, and efficiency throughout the company's operations.

- Participate in vendor negotiations to ensure product relevance, credit terms, shipping methods and cost-efficiency.
- Identify and select internal and external professional personnel to execute the business plan.
- Lead the effort to secure relationships with developing and prospective customers.
- Establish a real concern for customers and a sense of urgency in delivering solutions.
- Lead meetings to communicate the tactical and strategic business plans with all employees.
- Identify new vendors and solidify established supplier relationships.
- Negotiate and establish bank accounts, business loans, commercial credit lines.
- Maintain a close communication with the external accounting office to take care of all the legal paperwork of the business.
- Participate in negotiations with external contractors to ensure the correct working environment and establish the expectations of the business.
- Purchase of merchandise for resale.
- Attendance to conventions and training sessions to keep the business at the leading edge.

The petitioner provided the requested list of goals and policies established by the beneficiary discretionary decisions exercised by the beneficiary within the previous six months, and provide description of his day-to-day activities which was similar to that quoted above. The description of beneficiary's day-to-day duties also included calling and visiting customers to monitor status of orders and solicit new orders, calling vendors to check delivery issues and place orders, and performing market research. The petitioner indicated that the beneficiary supervises a systems programmer hired in April 2004 who develops and enhances client applications. The petitioner submitted its California Form DE-6, Quarterly Wage and Withholding Report, for the second quarter of 2004 and pay stubs for the months of April, May and June 2004, which confirmed that the systems programmer was employed on a part-time basis.

On July 29, 2004, the director denied the petition concluding that the beneficiary would not be employed in a managerial or executive capacity in the United States. The director noted that petitioner's description of the percentage of time the beneficiary devotes to each of his job duties reveals that he primarily performs routine business tasks relating to the sales and service of computers and computer parts. The director noted that the conclusion was supported by the beneficiary's supervision of only one non-professional employee who would not adequately relieve the beneficiary from performing all of the non-qualifying functions of the business. The director observed that the fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act.

On appeal, counsel for the petitioner asserts that the beneficiary qualifies as a manager under the statutory definition because he manages the petitioner's business, has the authority to hire and fire employees, and supervises three professional employees. Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472 n. 5 (5th Cir. 1989) and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 573 (N.D. Ga. 1988) to stand for the proposition that the statute was not intended to limit managers or executives to persons who supervise a large number of persons or a large enterprise. Counsel claims that the systems programmer and 1

petitioner's two external contractors are all professionals working under the beneficiary's supervision. In support of this statement, the petitioner submits copies of educational documentation and certifications for claimed subordinates, two of whom have bachelor's degrees. The petitioner also submits a letter from an accountant confirming that the petitioner utilizes her firm's services in the field of accounting.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity in the United States. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* In addition, the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion Wo Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Although counsel claims on appeal that the beneficiary will be employed in a managerial capacity, the petitioner has submitted no evidence to establish that he will primarily perform managerial duties for the petitioning organization. Although the petitioner submitted a lengthy list of duties that described the beneficiary's role in overseeing the company's employees, policies, finances, contract negotiations, and strategic planning, the petitioner also estimated that the beneficiary devotes only 10 percent of his time to "administration and planning functions." As noted by the director, the petitioner indicated that the beneficiary devotes 30 percent of his time to providing the services of the business, including "technical jobs" and "systems analysis/design." Based on the petitioner's representations, the beneficiary allots an additional 10 percent of his time to sales, purchasing and customer service activities. These are also tasks necessary to provide a service or product, and these duties will not be considered managerial or executive in nature. 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).

While the AAO recognizes that the beneficiary exercises discretion over the day-to-day affairs of the business, the fact that the beneficiary owns and manages a small business is insufficient to establish that the beneficiary is employed in a managerial or executive capacity. The actual duties themselves reveal the true nature of the employment. See *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990). Accordingly, whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of providing that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. The word "primarily" is defined as "at first principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, the individual cannot also be "principally" or "chiefly" performing managerial or executive duties. As discussed above, the beneficiary's primary duties, requiring approximately 80 percent of his time, are related to sales, purchasing, customer service, and directly providing the technical services of the business.

On appeal, counsel asserts that the beneficiary qualifies as a manager pursuant to section 101(a)(44)(A)(ii) of the Act because he supervises three professionals. Counsel's argument is not persuasive. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction or study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1966); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by the subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. Although the petitioner has submitted evidence that its part-time "systems programmer" has a bachelor's degree, it has not established that such a degree is required for the position, which pays \$.25 above the minimum wage and does not appear to involve particularly complex duties. Nor has the petitioner shown that this employee supervises subordinate staff members or manages a clearly defined department or function of the petitioner, such that he could be classified as a manager or supervisor. Counsel claims that the beneficiary also supervises two external contractors, an accountant and a web designer, who are professionals. However, the petitioner has not submitted documentation evidencing that it regularly utilizes the services of these independent contractors or adequately described the services they provide, such that they could be considered employees for the purpose of this analysis. Going on record without supporting documentation is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Sol*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (F. Comm. 1972)). Thus, the petitioner has not shown that the beneficiary's subordinate employee is employed in a supervisory, professional, or managerial capacity, as required by section 101(a)(44)(A)(ii) of the Act.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.2 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the small size of the petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp. v. Pasquarell* or *Mars Jewelers, Inc. v. INS*. It is noted that both of the cases cited by counsel relate to immigrant visa petitions, and not the extension of a "new" nonimmigrant visa. As the new office extension regulations call for a review of the petitioner's business activities and staffing after one year, the cases cited by counsel are distinguishable based on the applicable regulations. See 8 C.F.R. § 214.2(l)(14)(ii). Additionally, 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. 165 (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 165. As counsel has not discussed the facts of any of the cited matters, they will not be considered in this proceeding.

Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial or executive capacity even though he was the sole employee. Counsel has furnished insufficient evidence to establish that the facts of the instant petition are analogous to those in the unpublished matter. Again, going on record without supporting documentary evidence is insufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 165. Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel states on appeal that the petitioner will hire additional employees in the future as needed. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Based on the foregoing discussion, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

The second issue in the present matter is whether the petitioner has established that it has a qualifying relationship with the foreign entity.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in pertinent part:

- (G) *Qualifying organization* means a United States or foreign firm, corporation or other legal entity which meets exactly one of the qualifying relationships in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section.

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) 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.

The petitioner claimed to be an affiliate of the beneficiary's foreign employer and stated that both businesses 100 percent owned and controlled by the same individual, the beneficiary. The petitioner submitted evidence indicating that both the foreign entity and the U.S. entity are sole proprietorships.

The director denied the petition concluding that the petitioner is not a qualifying organization, and therefore no qualifying relationship with the foreign entity. Specifically, the director determined:

A sole proprietorship does not qualify as a legal entity for purposes of filing a nonimmigrant intracompany transferee petition for an owner. 8 C.F.R. 214.2(l)(1)(ii) requires that the beneficiary seek to enter the United States temporarily in order to continue to render his services to a branch of the foreign employer or a parent, affiliate, or subsidiary thereof. For nonimmigrant purposes, a corporation is a separate legal entity from its stockholders and able to file a petition and employ them. *Matter of Tessel*, 17 I. & N. Dec. 631 (Comm'r 1981). However, neither a sole proprietorship nor a partnership is a legal entity apart from its owner or owners. *Matter of United Investment Group*, 19 I. & N. Dec. 248 (Comm'r 1984).

Accordingly, where a sole proprietor files a petition for its owner, there is no separate legal entity that can employ the beneficiary and that can continue the business operations once the beneficiary is transferred abroad upon completion of the temporary services.

It is fundamental to this nonimmigrant classification that there be a United States entity to employ the beneficiary. In order to meet the definition of "qualifying organization," there must be a United States employer. 8 C.F.R. 214.2(l)(1)(ii)(G)(2). . . .

Approval of the instant case would effectively permit the beneficiary to self-petition. If the petitioner is actually the individual beneficiary doing business as a sole proprietorship, with no authorized branch office of the foreign employer or separate legal entity in the United States, there is no U.S. entity and no qualifying organization.

On appeal, counsel asserts that the petitioner is in the process of becoming a corporation and provides a copy of articles of incorporation to be filed with the California Secretary of State.

The petitioner has not submitted evidence on appeal to overcome the director's determination on this issue. Again, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A

petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a set of facts. *Matter of Michelin Tire Corp., supra*. As the petitioner was a sole proprietorship owned by the beneficiary at the time the petition was filed, it is not a qualifying organization. For this additional reason, the appeal will be dismissed.

The AAO notes that CIS approved a previous petition filed by the petitioner on behalf of this beneficiary (WAC 03 206 50964). As the petitioner is not and never was a qualifying organization as defined at 8 C.F.R. § 214.2(l)(1)(ii)(G) of the Act, the approval of the first petition constituted gross error on the part of the director. The approval of the initial petition should be revoked if that record contains the same evidence submitted with this petition. See 8 C.F.R. § 214.2(l)(9)(iii).

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 Scientific 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, 1088 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988). Furthermore, the AAO's authority over the service center is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition 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 petition will be denied for the above stated reasons, with each considered as an independent alternative basis for denial. 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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.