**COLLATERAL ESTOPPEL and ISSUE PRECLUSION in the QUESTION of MANAGERIAL or EXECUTIVE CAPACITY**

By Joseph P. Whalen (Monday, August 3, 2015)

It is not too much to ask that once the **hard fought details** have been demonstrated with **solid evidence** and **accepted** as true, at least by a preponderance, that they **not be revisited as a matter of routine**. This concept is known as **collateral estoppel** or **issue preclusion**. The following is a useful case to study concerning that concept. This case arose in the challenge of an **Order of Removal** but it applies in **Benefits Determinations** also.

**Oyeniran v. Holder, 672 F.3d 800 (9th Cir. 2012) No. 09-73683 (March 6, 2012),** explains:

“IV. Discussion

A. Collateral Estoppel Applies in Immigration Proceedings

[1] It is beyond dispute that the **doctrine of collateral estoppel** (or issue preclusion) applies to an administrative agency’s determination of certain issues of law or fact involving the same alien in removal proceedings. **Allen v. McCurry, 449 U.S. 90, 94 (1980); Ramon-Sepulveda v. INS, 824 F.2d 749, 750 (9th Cir. 1987) (per curiam)** (doctrine applies even when the agency reopens a removal proceeding for new evidence); **Matter of Fedorenko, 19 I. & N. Dec. 57, 57 (BIA 1984)** (doctrine conclusively establishes the ultimate facts of a subsequent deportation proceeding and precludes reconsideration of issues of law resolved by the prior judgment —absent a change in the controlling law).

**Collateral estoppel** applies to a question, issue, or fact when four conditions are met:

(1) the issue at stake was identical in both proceedings;

(2) the issue was actually litigated and decided in the prior proceedings;

(3) there was a full and fair opportunity to litigate the issue; and

(4) the issue was necessary to decide the merits.

**Montana v. United States, 440 U.S. 147, 153-54 (1979); Clark v. Bear Stearns & Co., Inc., 966 F.2d 1318, 1320 (9th Cir. 1992).”** [Slight reformatting for clarity.]
**Collateral estoppel** is very easily illustrated in EB-5 cases¹ as explained in several prior articles. The case for **issue preclusion** can also be seen in cases involving **jobs** that have already been **accepted as qualifying for classification** in either a **managerial** or an **executive capacity**. Two visa classifications involve the transfer of existing employees from offices abroad to the United States to continue doing their jobs. There is a **nonimmigrant** version designated as visa code L1-A, and an **immigrant** version designated as visa code E1-3 (sometimes referred to as EB-1C).

Both of the visa classifications mentioned above rely on statutory definitions found at INA § 101 [8 U.S.C. § 1011] Definitions –

(a) As used in this chapter-

(44) (A) The term "managerial capacity" means 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.

(B) The term "executive capacity" means an 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.

(C) If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

How does collateral estoppel apply to the adjudication of an I-140 for E13 classification following on a period of stay as an L1-A? Let’s take a closer look at that situation.

(1) **The issue at stake was identical in both proceedings:**
   - The position is either in a managerial or an executive capacity, as per the relevant statutory definition.
   - The nature of the position has not diminished in capacity.

(2) **The issue was actually litigated and decided in the prior proceedings:**
   - The L1-A was approved and the visa was **issued** or the change or extension of status was **granted**.

(3) **There was a full and fair opportunity to litigate the issue; and**
   - If the petition was not approved based on the petition “as submitted”, an RFE or NOID was issued and the response was found sufficient to grant the petition.
   - L1-A may have been approved after a motion or an appeal.
(4) The issue was necessary to decide the merits.

✓ With the **single exception** of a “new office” set-up scenario, L1-A classification required meeting the same statutory definition applicable to the instant position.

✓ The prior petition was, in fact, approved; visa issued or request to change status or extend stay was granted for a position in a *managerial* or an *executive capacity*.

It is near impossible to gain a clear perspective on the issues involved in assessing a case for *collateral estoppel* as to the characterization of a position, from the AAO *non-precedential* decisions posted online. For example, this excerpt is from the dismissal in a case involving a current nonimmigrant employee being denied for an immigrant managerial position. While there is a vague reference to *several nonimmigrant petitions*, the classification is not mentioned.

What I find even more disturbing is that in both an L1-A (if that is what was involved) and a multinational manager (E13), as presented here, also demand a *qualifying relationship* between the U.S. and foreign employers. Both categories define key terms used to describe the possible business relationships. The potential relationships are *nearly identical*. The key definitions are included below for a side-by-side comparison, enjoy.

“The regulations give the director discretion to issue an RFE in order to elicit further information that clarifies whether the petitioner has established eligibility for the benefit sought as of the petition’s filing date. See 8 C.F.R. §§ 103.2(b)(8) and (12), 204.5(j)(3)(ii). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The letter from the petitioner's general counsel sets forth the petitioner's claim, but is not evidence in support of that claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). That letter cited an organizational chart in
the record, but no primary documentation to establish the ownership arrangement described on that chart.

The petitioner notes the approval of several nonimmigrant petitions that it had previously filed on the beneficiary’s behalf. The director’s decision does not discuss these prior approvals of the other nonimmigrant petitions, and the record does not include or identify the evidence submitted in support of those approved nonimmigrant petitions. We are 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 Scientology International, 19 I&N Dec. 593, 597 (Comm’r 1988).

While the director erred by giving insufficient consideration to the nominee agreements, those agreements do not establish the required qualifying relationship between the foreign employer and the petitioning U.S. employer. Rather, they presume that relationship, based on reference to primary documents that are absent from the record even after the director specifically requested them. Accordingly, we cannot conclude based on the evidence of record that the petitioner has a qualifying relationship with the foreign entity.”

JUL092015_02B4203.pdf at p. 7.

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**Dated this 3rd day of August, 2015**

![Signature]

/s/ Joseph P. Whalen

That’s my two-cents, for now!

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NONIMMIGRANT

**8 C.F.R. §214.2** Special requirements for admission, extension, and maintenance of status.

The general requirements in §214.1 are modified for the following nonimmigrant classes:

- Intracompany transferees—

  (1) Admission of intracompany transferees—

    (ii) Definitions—

    (G) **Qualifying organization** means a United States or foreign firm, corporation, or other legal entity which:

    (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(i)(ii) of this section;

    (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien’s stay in the United States as an intracompany transferee; and

    (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

    (H) **Doing business** means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

    (I) **Parent** means a firm, corporation, or other legal entity which has subsidiaries.

    (J) **Branch** means an operating division or office of the same organization housed in a different location.

    (K) **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,


IMMIGRANT

**8 C.F.R. §204.5** Petitions for employment-based immigrants.

(j) **Certain multinational executives and managers.**

(1) 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.

(2) **Definitions.** As used in this section:

    **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; or

    (C) In the case of a **partnership** that is organized in the United States to provide accounting services, along with managerial and/or consulting services, and markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

    **Doing business** means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

    **Multinational** means that the qualifying entity, or its affiliate, or subsidiary, conducts business in
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.

(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, or

3. In the case of a **partnership** that is organized in the United States to provide **accounting** services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

**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.