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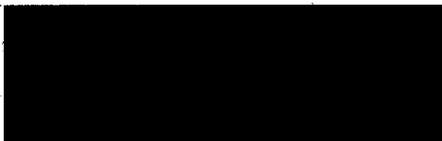
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FILE: 

Office: TEXAS SERVICE CENTER Date: **AUG 01 2005**

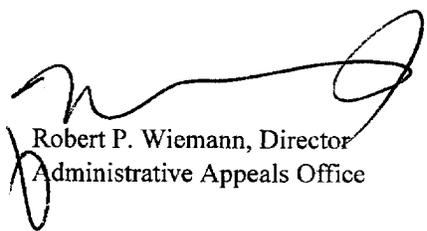
IN RE: Petitioner: 
Beneficiary: 

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:


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DISCUSSION: The approval of the preference visa petition was revoked by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed.

The petitioner was established in 1999 in the state of Florida. The petitioner is engaged in the hotel business and is seeking to employ the beneficiary as marketing director. 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 petitioner filed its first Form I-140 petition (SRC 01 161 55288) for the beneficiary on April 23, 2001. At that time, attorney [REDACTED] represented the petitioner as counsel. Subsequently, on May 23, 2003, [REDACTED] was convicted on multiple counts relating to immigration fraud, including conspiracy to commit offenses against the United States, making false statements, and harboring aliens. On July 23, 2003, the director acknowledged the withdrawal of the first petition. Because Mr. [REDACTED] was involved in facilitating numerous fraudulent immigrant visa petitions, the director reviewed the present petition and instructed the petitioner to submit additional documentation to establish that the petitioner had, in fact, filed a credible visa petition based on a bona fide job offer.

The petitioner, represented by new counsel, filed the second petition on March 12, 2002 based on the same proffered position as the first petition. The petition was subsequently approved on June 18, 2003. On September 16, 2003 the director issued a notice of Citizenship and Immigration Services' (CIS) intent to revoke the previously approved petition.

On November 10, 2003 the director issued the final notice revoking approval of the petition. Although the director commented on the beneficiary's change in job positions from "marketing director" to "president," the revocation was based on two grounds that were unrelated to the beneficiary's change in job positions. Specifically, the director observed that the petitioner must establish eligibility as the time of filing and revoked the approval based on the following findings:

- (1) The director noted that, at the time of filing, the beneficiary was one of only two motel employees and that both were self-styled as managerial positions. The director found that the lack of a support staff indicated that the beneficiary primarily performed marketing-related duties to accommodate the petitioner's needs and, therefore, was not and would not be primarily employed in a qualifying managerial or executive capacity. *See* 8 C.F.R. § 204.5(j)(5).
- (2) The director noted that the petitioner failed to submit sufficient evidence to document the foreign entity's purchase of the petitioner's stock and, therefore, failed to establish that a qualifying relationship exists between the petitioner and the foreign entity. *See* 8 C.F.R. § 204.5(j)(3)(i)(C).

On appeal, counsel fails to address the specific grounds for the revocation. Instead, counsel asserts that the beneficiary's change in job positions is not an adequate reason to revoke approval of the petition, and

introduced a service memo, which discusses the American Competitiveness in the Twenty-First Century Act (AC21), Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000). *See also* Memorandum from William Yates, Deputy Executive Associate Commissioner, CIS, "Procedures for concurrently filed family-based or employment-based Form I-485 when the underlying visa petition is denied" HQADN 70/23.1 (Feb. 28, 2003) ("Service adjudicators should also deny the concurrently filed Form I-485 when the underlying visa petition is denied because the applicant has lost the claim to adjustment of status.") Counsel attempts to circumvent the director's analysis regarding the issues of the claimed qualifying relationship and the beneficiary's job duties, and focuses instead on the incorrect assumption that the director revoked the petition based on the beneficiary's change in job positions.

Section 106(c) of AC21 amended section 204 of the Act by adding the following provision, codified as 8 U.S.C. § 1154(j):

Job Flexibility For Long Delayed Applicants For Adjustment Of Status To Permanent Residence - A petition under subsection (a)(1)(D) [since re-designated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Counsel's assertion is that the beneficiary's promotion to the position of president constitutes a job offer in a "same or similar occupational classification" and, given that the beneficiary's adjustment application had been pending more than 180 days, the underlying initial petition remains valid and the beneficiary is eligible to adjust status based on the new offer of employment under the terms of section 106(c) of AC21. This office notes that the determination of whether or not the initial petition "remains valid" for the purpose of adjustment of status under the terms of section 106(c) of AC21 does not lie with the AAO, but rather with the office that has jurisdiction over the application for adjustment of status.¹ In this case, that office is the Texas Service Center and the director denied the beneficiary's adjustment of status application.

The primary focus in the instant matter is whether, at the time the petition was filed, the petitioner established that the beneficiary would be primarily employed in a qualifying managerial or executive capacity and whether it had submitted sufficient evidence to establish a qualifying relationship with the beneficiary's foreign employer. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The director contemplated both issues and determined that the petitioner had failed on both counts. Thus, asserting that the petition remains valid under the terms of section 106(c) of AC21 is entirely irrelevant in the instant matter.

¹ The AAO notes that, to be considered "valid" in harmony with related provisions and with the statute as a whole, the petition must have been filed for an alien that is "entitled" to the requested classification and that petition must have been "approved" by a CIS officer pursuant to his or her authority under the Act. *See generally*, § 204 of the Act, 8 U.S.C. § 1154. A petition is no longer "valid" for porting purposes when the I-140 is denied by an officer or approved and subsequently revoked pursuant to section 205 of the Act, 8 U.S.C. § 1155.

Counsel does allude to other purportedly approved nonimmigrant L-1 petitions, which he claims were based on the same evidence as submitted in the instant matter. The petitioner did not introduce copies of the previous nonimmigrant petitions as evidence and those petitions are not part of the beneficiary's A-file, the current record of proceeding. After approval, each individual L-1 nonimmigrant petition is stored at the CIS Remote Files Maintenance Facility in Harrisonburg, Virginia, and is not readily available for review in conjunction with a subsequently filed immigrant petition. Each L-1 nonimmigrant petition is a separate record of proceeding with its own separate burden of proof; each petition must stand on its own individual merits. *See generally* Section 291 of the Act, 8 U.S.C. § 1361; *also* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. Many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant I-129 L-1 petitions. *See e.g. Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989).

If any previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval 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 prior approvals 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).

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

In the instant matter, the petitioner was allowed ample opportunity to submit evidence and/or information addressing the director's grounds for revoking approval of the petition. However, it failed to specifically address those issues and instead introduced a discussion of section 106(c) of AC21, which is irrelevant to the

petitioner's case. The petitioner's failure to address the specific grounds for the revocation in effect concedes those issues; the director's decision will be affirmed on both counts.

The regulation at 8 C.F.R. § 103.3(a)(1)(v) states, in pertinent part:

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

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. Inasmuch as counsel has failed to identify specifically an erroneous conclusion of law or a statement of fact in this proceeding, the petitioner has not sustained that burden. Therefore, the appeal will be summarily dismissed.

ORDER: The appeal is summarily dismissed.