

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B4



FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

AUG 07 2006

WAC 97 051 51015

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, Chief
Administrative Appeals Office

DISCUSSION: The approval of the preference visa petition was revoked by the Director, California Service Center on February 15, 2005. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The appeal was dismissed. The matter is now before the AAO on motion to reconsider. The motion will be rejected as improperly filed.

The petitioner is a California corporation initially engaged in the business of importing and selling black and white televisions. The petitioner is currently in the business of marketing and selling key chains and thermos coffee mugs. It seeks to employ the beneficiary as its sales 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 denied the petition on three separate grounds of ineligibility: 1) the petitioner was not conducting business in a regular, systematic, and continuous manner; 2) the petitioner failed to establish that the beneficiary had been employed abroad in a qualifying managerial or executive capacity; and 3) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

In the instant matter, a motion was filed in response to the AAO's dismissal of the appeal.

In order to properly file a motion, the regulation at 8 C.F.R. § 103.5(a)(1)(i) provides that the affected party must file the motion within 30 days of service of the unfavorable decision. If the decision was mailed, the motion must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b).

In accordance with 8 C.F.R. § 103.2(a)(7)(i), an application received in a Citizenship and Immigration Services (CIS) office shall be stamped to show the time and date of actual receipt, if it is properly signed, executed, and accompanied by the correct fee. For calculating the date of filing, the motion shall be regarded as properly filed on the date that it is so stamped by the service center or district office. *Id.*; *see also* 8 C.F.R. § 103.5(a)(1)(iii) for motion filing requirements.

The record indicates that the AAO issued the decision dismissing the petitioner's appeal on November 23, 2005. Although the petitioner's motion was initially received by the service center on December 23, 2005, it was sent back to the petitioner with a notice indicating that the motion was not properly signed and lacked the proper filing fee of \$385. Contrary to counsel for the beneficiary's argument, the motion cannot be deemed received until it fully complies with 8 C.F.R. § 103.2(a)(7)(i), which in the instant matter did not occur until January 4, 2006, 42 days after the AAO's decision was issued.¹ Therefore, the motion was untimely filed and must be rejected. *See* 8 C.F.R. § 103.2(a)(7)(i).

Additionally, though previously overlooked by both the service center and the AAO, the record contains a number of Form G-28s filled out and filed by Land Wayland. However, it is noted that of the six Form G-28s

¹ The fourteen calendar days/ten business days provision is only applicable in cases where a check or other financial instrument used to pay a filing fee is dishonored or subsequently returned as not payable. 8 C.F.R. § 103.2(a)(7)(ii); 8 C.F.R. § 103.7(a)(2). In other words, this provision does not apply to filing fees submitted that are payable but are made out for an incorrect amount. Moreover, the petitioner or an attorney's failure to submit the correct filing fee will not be deemed reasonable or beyond the control of the applicant or petitioner for purposes of 8 C.F.R. § 103.5(a)(1)(i).

filed by [REDACTED] only three were actually signed by the represented party and none identified the petitioner as the represented party. Rather, the beneficiary was identified as the represented party in all six of the Form G-28s. CIS regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing a petition; the beneficiary of a visa petition is not a recognized party in a proceeding. 8 C.F.R. § 103.2(a)(3). As the beneficiary and his representative are not recognized parties, counsel for the beneficiary is not authorized to file a motion. Therefore, in light of counsel's entry of his appearance only on behalf of the beneficiary, the AAO cannot accept his filing of a motion on behalf of the petitioner. For this additional reason the motion must be rejected as improperly filed.

However, even if the AAO were to give this motion full consideration, it would be dismissed on its own merits.

In its appellate decision, the AAO determined that the petitioner submitted sufficient evidence to overcome the first ground for denial and withdrew the portion of the director's decision that relates to the question of whether the petitioner was doing business in a regular, systematic, and continuous manner.

The AAO also fully addressed the two remaining issues dealing with the beneficiary's employment capacity abroad and in the United States and upheld the director's decision to revoke the approval of the petitioner's Form I-140.

On motion, counsel for the beneficiary disputes the AAO's decision, asserting that the AAO failed to explain how the service centers could have issued numerous erroneous approvals of the petitioner's L-1A petitions. Counsel takes issue with the AAO's failure to explain what namely about the prior service center decisions was erroneous. While the AAO understands counsel's frustration with an admittedly imperfect system, it is unreasonable to expect the AAO to investigate the numerous separate records of proceedings, none of which are before the AAO, in order to explain the thinking processes of each CIS officer who made an erroneous decision with respect to the beneficiary in this matter.² Rather, the AAO's function is to analyze the evidence in any given record of proceeding and determine whether eligibility has been established based on the eligibility factors specified in the statute and regulations. In the instant matter, the AAO's prior decision includes a thorough and detailed analysis of the documentation submitted by the petitioner up to this point. The reasons for the AAO's decision are clearly delineated. Thus, counsel's claim that the AAO failed to specify the deficiencies in the beneficiary's job descriptions is simply without merit.

Counsel for the beneficiary further addresses the AAO's perceived failure to cite any authority for its decision. Again, however, counsel's complaint is without merit, as the AAO's decision was largely based on its discretionary authority in analyzing the sufficiency of the evidence provided by the petitioner. There is no specific authority, which directly addresses the specific facts of the instant matter. The AAO has clearly

² 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 prior approvals do not preclude CIS from denying an extension petition. *See e.g., Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. CIS denies many I-140 immigrant petitions after approving nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d at 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. at 1103.

provided citations for all legal principles cited in its decision. It is unreasonable for counsel to imply that the AAO must also find authoritative sources to support its evidentiary findings with regard to case-specific facts. *See* 8 C.F.R. § 103.2(b)(2)(iii).

Next, counsel for the beneficiary takes issue with the AAO's rejection of updated job descriptions the petitioner attempted to provide, asserting that the petitioner has evolved over a period of eight years and such changes in job descriptions are to be expected. However, counsel's perception of the facts is erroneous. As previously stated in the AAO's prior decision, the petitioner's initial eligibility must be established at the time of filing, not after CIS has pointed out various deficiencies with the specific facts provided in support of the initial petition. *See Matter of Katigbak*, 14 I&N Dec. 45; 49 (Comm. 1971). Thus, while the petitioner's progress may be considered in determining its ability to maintain eligibility to support a qualified position, the initial eligibility must be established based on the facts as they existed at the time the Form I-140 was filed. If the petitioner wishes to offer a different position to the beneficiary, however, and have those new proffered job duties considered, a new I-140 immigrant petition must be filed.

In a separate letter dated January 26, 2006, the beneficiary provides additional information regarding his duties in the United States and asserts that he has been employed in a qualifying capacity contrary to prior determinations by the CIS. The beneficiary discusses the variety of executive decisions he has made to improve the petitioner's business over the years. He also asserts that he was employed by the foreign entity in a qualifying managerial capacity.

However, 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 CIS 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.

In the instant matter, counsel for the beneficiary has voiced his extreme dissatisfaction with the AAO's decision and as a result makes unreasonable demands that are not supported either by statute or regulation. While the beneficiary's own statement provides additional information with regard to his U.S. and foreign job responsibilities, neither his statement nor counsel's brief meet the requirements set out in the regulation pertaining to motions to reconsider. Therefore, even if the motion had been properly filed, it would be dismissed in accordance with 8 C.F.R. § 103.5(a)(4), which states, in pertinent part, that a motion that does not meet applicable requirements shall be dismissed.

As a final note, even the proper filing of a motion to reopen or reconsider does not stay the AAO's prior decision to dismiss an appeal or extend a beneficiary's previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

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, the petitioner has not sustained that burden.

ORDER: The motion is rejected.

[Redacted]

Page 5

cc:

[Redacted]