



U.S. Citizenship
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Services

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FILE:

EAC 03 021 51641

Office: VERMONT SERVICE CENTER

Date:

DEC 17 2008

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.

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).


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion will be dismissed.

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the Commonwealth of Massachusetts that is operating as a convenience store and a money remittance agency. According to counsel, prior to the denial of the instant petition, the petitioning entity was sold and the beneficiary, with his wife, began operating a new business in the State of Connecticut. Under the present petition, the petitioner sought to employ the beneficiary as its president.¹

In a decision dated October 4, 2006, the director denied the petition concluding that the petitioner had not demonstrated that the beneficiary has been and will be employed in a primarily managerial or executive position. In denying the petition, the director noted the petitioner's failure to submit certain evidence that was specifically requested in a Notice of Intent to Deny issued prior to the adjudication of the petition.

In the subsequently filed appeal, counsel maintained the beneficiary's eligibility for the requested immigrant visa classification, stating that the petitioner had provided a list of job duties sufficient to establish the beneficiary's former and proposed employment in a primarily managerial or executive capacity. Counsel challenged the director's review of the petition, claiming that U.S. Citizenship and Immigration Services (USCIS) failed to apply the "preponderance of the evidence" standard. Counsel also contended that the director failed to address AC21 and the beneficiary's eligibility to transfer to new employment while the I-140 petition was pending.²

The AAO dismissed the petitioner's appeal in a decision dated August 28, 2007, concluding that the petitioner failed to establish that the beneficiary had been or would be employed in a primarily managerial or executive capacity. The AAO cited the petitioner's failure to provide a detailed description of the beneficiary's job duties with its initial evidence or in response to the director's notice of intent to deny as the primary grounds for denial. The AAO acknowledged and discussed counsel's arguments that the director had failed to apply the "preponderance of the evidence" standard, noting that, given the paucity of evidence with respect to the

¹ On December 26, 2001, the petitioner filed its first I-140 immigrant petition seeking employment of the beneficiary as its president. The petition was denied on July 30, 2002. Despite certification under the penalty of perjury, the petitioner indicated in Part Four of the most recently filed Form I-140 it had not previously filed an immigrant visa petition on his behalf.

² In 2000, Congress passed the American Competitiveness in the Twenty-First Century Act (AC21), Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17 2000). Section 106(c) of AC21 amended section 204 of the Act. The "portability provision" at section 204(j) of the Act provides that "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 of a similar occupational classification as the job for which the petition was filed." CIS has not issued regulations governing this provision.

beneficiary's actual job duties, the submitted evidence was not sufficient to meet the petitioner's burden of proof.

The AAO also devoted eight full paragraphs of its decision to a detailed discussion of the beneficiary's eligibility to port to new employment under AC21, noting preliminarily that the beneficiary's new job and the portability considerations of AC21 are separate issues that must be addressed in the adjudication of the beneficiary's I-485 application, not in the I-140 decision. The AAO observed that for the AC21 portability provisions to apply, the underlying petition must be "valid" to begin with in order to "*remain* valid with respect to a new job." Section 204(j) of the Act, 8 U.S.C. § 1154(j). The AAO emphasized that, pursuant to the petitioner's failure to establish the beneficiary's employment in a primarily managerial or executive capacity with the foreign or U.S. entities, the record did not establish the beneficiary's initial eligibility for this visa classification. The AAO concluded that the instant petition cannot be deemed valid for purposes of section 106(c) of AC21.

Finally, the AAO noted for the record that it was not persuaded that the beneficiary's new position is "in the same or a similar occupational classification as the job for which the petition was filed," as required by Section 106(c) of AC21.

The petitioner subsequently filed the instant motion to reconsider on October 5, 2007. Counsel argues on motion that "the Service and the AAO have failed to apply the appropriate evidentiary standard," and "failed to weigh the positive factors." The content of the brief submitted on motion is largely identical to the brief submitted on appeal and already considered by the AAO. Counsel provides an overview of all documentation previously submitted and asserts that it is sufficient to establish the beneficiary's employment in a primarily managerial or executive capacity by a preponderance of the evidence. Counsel disagrees with the AAO's conclusion that the AC21 portability provision does not apply in this matter, and asserts that the AAO further erred by finding that the beneficiary's previous and current U.S. positions are not in the same or similar occupational classification.

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 or managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 regulation at 8 C.F.R. § 103.5(a)(3) states, 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 Service 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.

The regulation at 8 C.F.R. § 103.5(a)(4) states, in pertinent part, that a motion that does not meet applicable requirements shall be dismissed.

The purpose of a motion to reconsider is different from the purpose of an appeal. While the AAO conducts a comprehensive, *de novo* review of the entire record on appeal, a review in the case of a motion to reconsider is strictly limited to an examination of any purported misapplication of law or USCIS policy, which must be supported by precedent case law. As such, counsel's most recent assertion that the petitioner submitted sufficient evidence to establish eligibility for the benefit does not meet the requirements of a motion. The AAO previously conducted a *de novo* review of the entire record of proceeding and addressed the petitioner's arguments regarding the appropriate standard of review.

Furthermore, counsel does not support his assertions that the AAO misapplied law or USCIS policy with precedent case law relevant to the issue of whether the beneficiary has been and would be employed in a primarily managerial or executive capacity. Counsel cites to *Huck v. Attorney General*, 676 F. Supp. 10, 13 (D.D.C. 1987) and *Prapavat v. INS*, 662 F.2d 561, 563 (9th Cir. 1981) to stand for the proposition that USCIS must consider all of the evidence presented and the totality of the circumstances involved in the case at hand. However, counsel fails to identify how the AAO failed to consider the totality of the evidence submitted in this case, or what key evidence would have established the beneficiary's eligibility as of the date of filing. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Although the AAO commented for the record regarding the beneficiary's eligibility under the portability provisions of AC21, it also clearly stated that the issue was not properly before the AAO. The beneficiary's new job and the portability considerations are separate issues that must be addressed in the adjudication of the beneficiary's I-485 application, not in the I-140 decision. No appeal lies from the denial of an application for

adjustment of status under section 245 of the Act, 8 C.F.R. § 245.2(a)(5)(ii). Neither the director nor the AAO were required to address this issue at all in the adjudication of the I-140 petition, and the petition was not denied on this basis. Therefore, the AAO will not reconsider this issue on motion. The motion will be dismissed in accordance with 8 C.F.R. § 103.5(a)(4).

Although the motion will be dismissed, the AAO notes that it did not previously address the petitioner's argument that the beneficiary was previously granted L-1A nonimmigrant status and therefore already determined to be employed in a qualifying managerial or executive capacity for the petitioner.

With regard to the beneficiary's L-1 nonimmigrant classification, it should be noted that, in general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by USCIS than nonimmigrant petitions. The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427.

In addition, 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. *See* 8 C.F.R. § 103.8(d); 8 C.F.R. § 103.2(b)(16)(ii). USCIS is not required to assume the burden of searching through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand in the present matter. The approval of a nonimmigrant petition in no way guarantees that USCIS will approve an immigrant petition filed on behalf of the same beneficiary. USCIS denies many I-140 immigrant petitions after approving prior 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 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989).

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approvals 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). Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act.

Finally, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions 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).

In visa petition proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.