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U.S. Citizenship
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Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 31 2006

EAC 01 214 50012

IN RE: Petitioner:
Beneficiary: [redacted]

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: SELF-REPRESENTED

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, Vermont Service Center, revoked approval of the preference immigrant visa petition. The petitioner subsequently appealed that decision to the Administrative Appeals Office (AAO). The appeal was dismissed. The matter is now before the AAO on motion to reopen and reconsider.[1] The motion to reopen will be dismissed. While the AAO will grant the petitioner's motion to reconsider, the underlying decision dismissing the appeal will be affirmed.

The petitioner is a New Jersey corporation established in June 1997. It seeks to employ the beneficiary as its vice president. 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 revoked approval of the visa petition based on the determination that the petitioner had failed to submit evidence in rebuttal to the notice of intent to revoke within the given 30-day time frame.

The petitioner subsequently appealed the director's decision, disputing the propriety of the overall decision as well as the director's choice not to consider evidence, which the petitioner submitted beyond the 30 days allotted by the director in the notice of intent to revoke.

The AAO addressed specific deficiencies in the director's decision and considered the untimely-submitted evidence before issuing the final decision to dismiss the appeal and uphold the director's decision to revoke the approval of the petition.

On motion, the petitioner asserts that neither the director's revocation, nor the AAO's decision to dismiss the appeal is supported by statutory or precedent case law.

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

In the instant matter, the petitioner made no indication that new facts would be presented. Therefore, the motion to reopen will 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.

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

[1] It is noted for the record that, although the petitioner initially requests in July 2005 that the AAO reopen and reconsider its prior decision, the additional supporting documents submitted in September 2005 make no mention of either a motion to reopen or a motion to reconsider. Instead, it appears as if the petitioner is now seeking to file a second appeal, which is not provided for under the regulations. *See* 8 C.F.R. § 103.3. However, instead of rejecting the appeal, the AAO in its discretion will review the submissions in light of the original request, filed as a motion to reopen and reconsider its prior decision in this matter.

> petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Additionally, 8 C.F.R. § 103.5(a)(1)(i) states, in part, "[W]hen the affected party files a motion, the official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider *the prior decision.*" (emphasis added).

In the instant matter, the "prior decision" was that of the AAO dismissing the petitioner's appeal. *Id.* Thus, any portion of the petitioner's brief in support of the motion that questions the propriety of the director's decisions to first issue the notice of intent to revoke (NOIR) and subsequently the final notice of revocation will not be addressed in the present decision, as the appropriate time to raise these issues would have been on appeal. The only issues the AAO has jurisdiction to consider on motion are those directly dealing with the AAO's own prior decision, which in the instant matter is the AAO's decision dismissing the petitioner's appeal. The only proper venue to raise a motion to reopen or reconsider the director's decision is with the service center that issued the revocation. *See* 8 C.F.R. § 103.5(a)(1)(i).

With regard to the AAO's decision dismissing the appeal, counsel[2] asserts that the AAO erred in stating that the "ultimate burden" in overcoming a notice of revocation is on the petitioner. However, in proceedings to revoke the approval of a visa petition, the burden of proof to establish eligibility for the benefit sought is on the petitioner. *Id.* at 589; *Matter of Cheung*, 12 I&N Dec. 715 (BIA 1968); *see also Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The Board's decision in *Matter of Ho* is also relevant to this matter in clarifying that, by itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Counsel also questions the AAO's right to raise the issues of the beneficiary's employment abroad and in the United States, stating that both had been considered by CIS prior to the issuance of the petitioner's L-1A nonimmigrant visa. Counsel asserts that raising issues that were previously considered is synonymous with readjudicating the entire matter, which counsel claims is against CIS policy and regulations. However, it should be noted that, in general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS 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

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[2] Although the petition is accompanied by a Form G-28, Notice of Entry of Appearance by an Attorney or Representative, the claimed attorney/representative in this matter has not established that he or she is a licensed attorney or an accredited representative authorized to undertake representations on the petitioner's behalf. *See* 8 C.F.R. § 292.1. In fact, the individual only indicates on Form G-28 that he or she is a member of the High Court of Maharashtra and Goa. Accordingly, the foreign attorney's appearance will not be recognized, and the assertions made by the foreign attorney will not be given any weight in this proceeding.

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, unless a petition seeks extension of a "new office" petition, the regulations allow for the approval of an L-1 extension without any supporting evidence and CIS normally accords the petitions a less substantial review. *See* 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1 petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30 (recognizing that CIS approves some petitions in error).

Moreover, 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 nonimmigrant 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 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 at 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. at 1103.

Furthermore, if the 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). In this matter, however, U.S. Citizenship and Immigration Services (CIS) records indicate that only the petitioner's new office petition filed on behalf of the beneficiary was approved (EAC 97 229 53676). The subsequent new office extension petition filed by the petitioner on behalf of the beneficiary was denied (EAC 99 053 50691).

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).

Additionally, counsel's point that revoking a prior approval is synonymous with readjudication is without merit. Based on counsel's interpretation of the law, any petitioner with an approved nonimmigrant petition would have an irrevocable right to file and be automatically granted an I-140 immigrant petition; similarly, any approved I-140 immigrant petition would automatically become irrevocable by virtue of having been granted based on the assumption that all relevant issues had been decided prior to issuing an approval of the petition.

Counsel's assertion is erroneous and is contradicted by both statute and precedent case law. 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."

Counsel also draws the AAO's attention to a recent opinion issued by the United States Court of Appeals for the Second Circuit, *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d 127 (2d Cir. 2004). In that opinion, the court in Firstland interpreted the third and fourth sentence of section 205 of the Act, 8 U.S.C. § 1155 (2003), to render the revocation of an approved immigrant petition ineffective where the beneficiary of the petition did not receive notice of the revocation before beginning his journey to the United States. *Firstland*, 377 F.3d at 130. Counsel seemingly suggests that the reasoning of this opinion must be applied to the present matter and accordingly, CIS may not revoke the approval because the beneficiary did not receive notice of the revocation before departing for the United States, since he was already in the United States when the director issued the revocation.

According to the Form G-28 submitted on appeal, the petitioner lives in Edison, New Jersey; thus, this case did arise in the Second Circuit. In fact, even if this case did arise in the Second Circuit, *Firstland* is no longer a binding precedent.[3]

On December 17, 2004, the President signed the Intelligence Reform and Terrorism Prevention Act of 2004 (S. 2845). *See* Pub. L. No. 108-458, 118 Stat. 3638 (2004). Specifically relating to this matter, section 5304(c) of Public Law 108-458 amends section 205 of the Act by striking "Attorney General" and inserting "Secretary of Homeland Security" and by striking the final two sentences. Section 205 of the Act now reads:

> The Secretary of Homeland Security 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 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition.

Furthermore, section 5304(d) of Public Law 108-458 provides that the amendment made by section 5304(c) took effect on the date of enactment and that the amended version of section 205 applies to revocations under section 205 of the Act made before, on, or after such date. Accordingly, the amended statute specifically applies to the present matter and counsel's *Firstland* argument no longer has merit.

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 unrebutted, 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

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[3] The *Firstland* opinion summarily overturned 35 years of established agency precedent. *See Matter of Vilos*, 12 I&N Dec. 61 (BIA 1967). Counsel's arguments illustrate the illogical effects of the Second Circuit's reasoning: In the present matter, the beneficiary entered the United States as a nonimmigrant in February 1997, over six years prior to the filing of the Form I-140 immigrant petition and more than six years prior to the revocation of the petition's approval. Accordingly, it was physically impossible for CIS to have notified the beneficiary of the revocation before he departed for the United States. In effect, thi's interpretation of *Firstland* would have created a situation where any alien would have an irrevocable immigrant visa petition if the alien simply waited until after he or she arrived in the United States to file the petition.

> evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. at 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

Additionally, the Board of Immigration Appeals has held that the approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process; the beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Matter of Ho*, 19 I&N Dec. 582.

Despite counsel's insistence that the AAO heed the instruction of certain service memorandum and prior unpublished AAO decisions, neither can be deemed official CIS policy or published precedent case law. *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000); *see* also 8 C.F.R. § 103.3(c). As such, neither of these sources is binding on the AAO.

Counsel continues his argument, claiming that the AAO has no right to bring up issues of ineligibility that had not been previously introduced in regard to the present I-140 petition. However, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Finally, counsel addresses the issue of legislative intent, claiming that one of the main reasons for enacting the Immigration Act of 1990 was to liberalize the provisions and requirements for intracompany transferees and multinational managers and executives. While counsel may be correct, nothing speaks clearer of legislative intent than the previously noted section 205 of the Act, which bestows upon the Attorney General, and consequently CIS, the broad power to determine what constitutes "good and sufficient cause" for revoking an approval of an I-140 immigrant petition. While Congress may have been concerned with liberalizing United States policies with regard to granting immigrant and nonimmigrant visas to multinational managers and executives as well as intracompany transferees, respectively, there is no indication that Congress was willing to overlook the statutes and regulations used to filter out those petitioners that are clearly ineligible for these immigration benefits.

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 AAO's decision dismissing the appeal is affirmed.