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

U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 08 2007

WAC 04 192 51635

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:

[redacted]

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 Director, California Service Center, denied the employment-based immigrant petition. The petitioner subsequently filed an appeal with the Administrative Appeals Office (AAO). The AAO affirmed the director's decision and dismissed the appeal. The matter is again before the AAO on a motion to reconsider. The AAO will grant the motion. The prior decisions of the director and AAO will be affirmed.

The petitioner filed the 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 State of California that is engaged in international trade. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition concluding that the petitioner had not demonstrated that: (1) a qualifying relationship existed between the foreign and United States entities; or (2) the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, the petitioner's present counsel alleged that Citizenship and Immigration Services (CIS) "failed to properly consider the evidence provided by the petitioner," which counsel claimed demonstrates that the foreign entity is the sole owner of the United States corporation. Counsel also claimed that the beneficiary's managerial position in the United States company "is reflected in the organizational chart and job descriptions."

In an April 26, 2006 decision, the AAO dismissed the appeal, affirming the findings of the director. The AAO specifically noted unresolved discrepancies in the petitioner's claim that the foreign entity had furnished consideration in exchange for its purported ownership of the United States corporation. The AAO also addressed the beneficiary's proposed employment in the United States, noting that notwithstanding counsel's error in submitting on appeal evidence pertaining to the beneficiary's position after the filing date[1], the record was not sufficient to establish that the beneficiary would occupy a primarily managerial or executive position. The AAO also observed that the petitioner had not established that the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity.

On motion, counsel alleges the following on the Form I-290B:

> The beneficiary was initially granted one year in L-1A classification and was subsequently granted a two-year extension of his L-1A status. Then the petitioner filed the instant Form I-140 immigrant petition on behalf of the beneficiary under INA § 203(b)(1)(C). [Citizenship and Immigration Services (CIS)] denied the Form I-140 petition, concluding that the petitioner has not established (1) the existence of a qualifying relationship between the foreign and United States entities; and (2) the beneficiary would be employed in a primarily managerial or executive capacity.

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[1] The AAO addressed counsel's error in submitting an amended organizational chart depicting the petitioner's staffing levels more than a year after the petitioner filed the immigrant visa petition, and noted that the new evidence is not probative of the capacity in which the beneficiary was employed on the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) (stating that 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).

> The denial runs afoul of the related regulations and established agency law. The definition regarding the eligibility for an employment-based immigrant petition for a multinational executive or manager is essentially the same as that of an L-1A visa petition. *See* 8 C.F.R. § 214.2(l)(3), and 8 C.F.R. § 204.5(j)(2). In this case, however, [CIS] obviously applied a different standard in the L-1A versus the I-140 context when evaluating the existence of the petitioner's qualifying relationship with the foreign entity and the beneficiary's proposed employment capacity. [CIS] is not justified in departing from the prior nonimmigrant petition approvals and denying the immigrant petition filed on behalf of the same beneficiary. Therefore, the petitioner hereby submits this motion for reconsideration pursuant to 8 C.F.R. § 103.5(a)(3).

The regulation at 8 C.F.R. § 103.5(a)(3) states:

> 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 [Citizenship and Immigration Services (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.

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 issue in the instant proceeding is whether, in its review of an employment-based visa petition, CIS is bound by its prior approval of an L-1A nonimmigrant petition filed by the petitioner on behalf of the beneficiary.

Contrary to counsel's suggestion on appeal, 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). Although the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity and regulatory criteria for determining the existence of a requisite qualifying relationship, the question of overall eligibility requires a comprehensive review of all of the statutory provisions. *See* §§ 101(a)(44)(A) and (B) of the Act, and 8 C.F.R. §§ 204.5(j)(2) and 214.2(l)(1)(ii). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A 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, 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).

Here, the AAO's April 26, 2006 decision demonstrates a thorough examination of the beneficiary's eligibility for the requested visa classification. While counsel claims that CIS "applied a different standard" in its review of the I-140 petition than that used in the proceeding for the L-1A nonimmigrant visa, he has not identified any errors on the part of the director or the AAO. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel's claim on motion is based on the assumption that the prior two L-1A nonimmigrant petitions were properly approved. The AAO notes that a third L-1A nonimmigrant petition filed by the petitioner on behalf of the beneficiary was denied by CIS. Nevertheless, because CIS spends less time reviewing L-1 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 25 (D.D.C. 2003). If the previous nonimmigrant petitions were approved based on the same unsupported and unresolved discrepancies that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO notes that it 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).

Moreover, 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.

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 reality, 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 at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d at 22; *Fedin Brothers Co. Ltd. v. Sava,* 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions.

Due to the unresolved discrepancies and lack of required evidence in the present record, the AAO finds that the director was justified in departing from the previous nonimmigrant approvals by denying the present immigrant petition. Counsel's general objections to CIS' denial of the I-140 petition in light of two prior L-1A approvals are simply insufficient to overcome the well-founded and logical conclusions the director and the AAO reached based on a review of the record. Accordingly, the prior decisions of the director and the AAO are affirmed.

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, that burden has not been met.

ORDER: The decision of the AAO dated April 26, 2006 is affirmed.