U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: NOV 01 2007
LIN 06 181 51817

IN RE: Petitioner: [redacted]
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:

[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 preference visa petition was denied by the Director, Nebraska Service Center. The petitioner filed motion seeking to have the director reconsider his prior findings. The director dismissed the motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation seeking to employ the beneficiary as its manager of Eastern European sales. 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 based on three independent grounds of ineligibility: 1) the petitioner neither claimed nor submitted evidence of a qualifying relationship between the beneficiary's foreign and proposed U.S. employers; 2) the beneficiary was not employed abroad in a qualifying managerial or executive capacity; and 3) the beneficiary would not be employed in the United States in a managerial or executive capacity. The director observed that the applicant's filing of the certified ETA Form 9098 suggests that the applicant intended to file the instant visa petition under a different visa classification. The director added that because the Form I-140 was filed concurrently with a Form I-485, which is required to have a visa available at the time of filing, the Service was unable under current policy to "downgrade" the petition to a different visa category.

In response to the director's denial, counsel filed a motion, which the director dismissed, concluding that the petitioner failed to meet the requirements specified in 8 C.F.R. § 103.5 for a motion to reconsider.

On appeal from the director's latest decision, counsel addresses the director's comments suggesting the Service's right to "downgrade" a petition to a different visa classification. However, the AAO's scope of appellate review is limited to the subject matter addressed in the director's latest decision. In the present matter, the director's latest decision was his dismissal of the petitioner's motion to reconsider. Therefore, the AAO is charged with the task of determining whether the director was correct in dismissing the motion.

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 present matter, counsel's only submission on motion was a brief statement asserting, in part, that the "[d]irector erred in failing to consider the application in another classification for which the beneficiary is qualified rather than denying the [Form] I-140 petition itself." Counsel presented no pertinent precedent case law to support the assertion that the director's decision was incorrect based on the evidence on record at the time of the initial decision as required by 8 C.F.R. § 103.5(a)(3). Therefore, the director's decision to dismiss the petitioner's motion was warranted.

Additionally, while the subject matter of the director's initial denial is beyond the scope of the present matter, the AAO notes for the record and for clarification that there are no circumstances in the filing of a Form I-140 visa petition in which a petitioner may receive the benefit of being considered under two different visa classifications by filing a single petition. Rather, the instructions in Part 2 of the Form I-140 clearly state that

the petitioner must check one box to indicate the type of visa petition under which it seeks to classify the beneficiary. There is absolutely no indication that by merely checking one box, any given petitioner will or should be considered under multiple visa classifications. If this were the case, there would be no need for a petitioner to indicate the intended visa classification at all. Instead, the petitioner would simply submit whatever supporting evidence it had and leave CIS with the task of selecting the visa classification it deemed most suitable depending on the facts and documents presented. This is simply illogical and is contradicted by the plain language of the instructions to the Form I-140. Additionally, 8 C.F.R. § 103.2(a)(1) (2007) explicitly states that every petition filed "shall be executed and filed in accordance with the instructions on the form. . . ." Therefore, despite the director's confusing and misguided discussion about CIS's ability to "downgrade" a visa classification in various circumstances, the AAO is unaware of any statute, regulation, or precedent case law in which CIS has been vested with such discretion.

In assessing the facts of the present matter, it appears that the petitioner either 1) made a serious error in filling out the Form I-140 and requesting consideration for a visa classification for which the petitioner was clearly not eligible; or 2) the petitioner deliberately chose the visa classification in order to have the beneficiary's Form I-485 accepted by CIS, an event that would not have happened if the petitioner filed a Form I-140 seeking the proper visa classification for which a visa was not available at the time of filing. In either case, the director properly considered the petitioner's eligibility based on the visa classification marked on the petitioner's Form I-140 and the supporting documents submitted along with that petition. Although the director may suspect that the petitioner intended to file the Form I-140 under a different visa classification, the director was correct in assessing the facts and documentation submitted based only on the visa classification that was in fact indicated by the petitioner in Part 2 of the Form I-140.

Regardless, 8 C.F.R. § 103.5(a)(4) states, in pertinent part, that a motion that does not meet applicable requirements shall be dismissed. In the present matter, the director properly determined that counsel's statement did not meet the requirements for a motion to reconsider. As such, the director's dismissal of the petitioner's motion was the proper course of action and will be affirmed by the AAO.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.