U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

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FEB 22 2005

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC 02 173 50183

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, Director
Administrative Appeals Office

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DISCUSSION: The Director, California Service Center, approved the instant employment-based petition on May 29, 2003. On February 26, 2004, the director issued a Government Motion to Reopen/Notice of Intent to Deny. On April 9, 2004, the director issued a decision denying the petition and certified his decision to the Administrative Appeals Office (AAO) for review. The petition will be remanded to the California Service Center.

The petitioner is a corporation incorporated under the laws of Bermuda in May 1999. Its United States headquarters are located in the State of California. It operates a number of cruise ships. The petitioner seeks to permanently employ the beneficiary as its Production Shows Coordinator. Accordingly, the petitioner endeavors to classify the beneficiary as an immigrant as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

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 and 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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

The procedural history of this matter is complex and requires a brief recitation of past actions on the part of the petitioner and Citizenship and Immigration Services (CIS) to understand the director's certification of the matter to the AAO:

In October 1996, the beneficiary was approved for admittance into the United States as a nonimmigrant under an L-1B specialized knowledge intracompany transferee classification. In March 2001 the beneficiary's extension as a specialized knowledge employee expired.

In June 2001, the beneficiary was approved for admittance into the United States as a nonimmigrant under an L-1A managerial or executive intracompany transferee classification. The beneficiary's classification as a managerial or executive intracompany transferee expired in March 2004.

On or about April 30, 2002, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, (WAC 02 173 50183, the petition subject to this certification) seeking an immigrant visa for the beneficiary. On August 20, 2002, the director requested further evidence on several issues, including the issue of the beneficiary's foreign employment prior to entering the United States as a nonimmigrant. The petitioner responded on or about November 11, 2002. The director denied the petition on April 21, 2003.

On May 22, 2003 the petitioner filed a Form I-290B, Notice of Appeal. The petitioner submitted a brief requesting that the director reopen and reconsider his decision. On February 26, 2004, the director dismissed the request to reopen and reconsider his prior decision, stating that: (U.S. Citizenship and Immigration Services [CIS]) records indicate that the petition was approved on May 29, 2003." The director determined that the petitioner's motion to reopen or reconsider was moot.

In addition to dismissing the petitioner's motion to reopen or reconsider, the director issued a "Government Motion to Reopen/Notice of Intent to Deny," also on February 26, 2004. On March 26, 2004 the petitioner responded to the director's notice of intent to deny. On April 9, 2004, the director issued his decision denying the petition and certified the matter to the AAO. The director's denial was based on the petitioner's failure to establish that the beneficiary had been employed for one year prior to entering the United States as a nonimmigrant in a managerial or executive capacity, a requirement for this visa classification. *See* 8 C.F.R. § 204.5(j)(3)(i)(B).

Counsel for the petitioner submits a brief for the AAO's consideration on certification.

In this matter, the director improperly issued a motion to reopen pursuant to the regulation at 8 C.F.R. § 103.5(a), rather than issuing a notice of intent to revoke pursuant to 8 C.F.R. § 205.2(b).[1]

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[1] Generally speaking, a CIS motion to reopen with an intent to deny is reserved for applications, such as Form I-539, Application to Extend/Change Nonimmigrant Status; Form I-90, Application to Replace Permanent Resident Card; or Form I-765, Application for Employment Authorization. Although a service motion to reopen with a notice of intent to deny follows similar procedural actions to a notice of intent to

Following approval of an immigrant visa petition, the director must revoke approval of the petition in accordance with the statute and regulations. Specifically, section 205 of the Act, 8 U.S.C. § 1155 (2005) states:

> 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.

The regulation at 8 C.F.R. § 205.2 provides that a CIS officer may revoke approval of an immigrant petition following notice to the petitioner of the intent to revoke and after providing the petitioner with an "opportunity to offer evidence in support of the petition . . . and in opposition to the grounds alleged for revocation of the approval." Pursuant to *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987), the director's notice of intent to revoke must include a specific statement of the facts and supporting evidence underlying the proposed action. Similarly, the petitioner must be advised of derogatory evidence of which he is unaware, and must be provided with an opportunity to rebut the evidence and submit supporting documentation. *Id.* at 451. Further, where a notice of intent to revoke "is based on an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence, revocation of the visa petition cannot be sustained, even if the petitioner did not respond to the notice of intention to revoke." *Id.* at 452.

With regard to a director's decision to revoke, the regulation at 8 C.F.R. § 205.2(c) further indicates:

> If, upon reconsideration, the approval previously granted is revoked, the director shall provide the petitioner or the self-petitioner with a written notification of the decision that explains the specific reasons for the revocation.

In the instant matter, as the director did not issue a notice of intent to revoke, the decision of the director will be withdrawn and the matter will be remanded to the California Service Center for additional action.

The matter is remanded to provide counsel the opportunity to submit a new legal argument, as well. Counsel should note that her reliance on the following two memoranda is misplaced and not on point: Memorandum of [redacted] Assistant Commissioner for Adjudications, INS, CO214L-P, (January 13, 1989) ([redacted]; and Memorandum of [redacted] Associate Director for Operations, USCIS, HQOPRD 72/111.3 (April 23, 2004) [redacted]. The "material error," as discussed in the [redacted] and the "gross error," as discussed in the [redacted] specifically apply to nonimmigrant petitions. The "gross error" standard has been incorporated into the regulations for the revocation of a nonimmigrant L-1A petition. *See* 8 C.F.R. § 214.2(l)(9)(iii)(*5*). The "material error" standard discussed in the more recent [redacted] is administrative in nature, applies only to nonimmigrant extensions, and is not based on law or regulation. As

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revoke, the revocation of an immigrant visa petition is governed by a specific legal standard. *See* section 205 of the Act.

the present case involves the statutory revocation of an immigrant visa petition, neither standard applies in this matter. In the context of immigrant visa petition proceedings, the director should disregard any argument proffered by counsel that is based on these two memoranda.

With regard to the similarity of the eligibility criteria, 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 L-1A nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and a Form I-140 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.

It must be noted that many Form I-140 immigrant petitions are denied after CIS approves prior nonimmigrant Form I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *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). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L1-A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 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).

Finally, each petition is a separate record of proceeding and receives an independent review. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Moreover, counsel should note that 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. at 597.

The director's decision will be withdrawn and the matter will be remanded to the director for further review and a decision consistent with the foregoing. Upon entry of a new decision, the director's decision shall be certified to the AAO for review, regardless of whether the decision is favorable or adverse to the petitioner.

ORDER: The petition is remanded to the director for the issuance of a notice of intent to revoke and the entry of new decision that shall be certified to the AAO upon completion.