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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

By

[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: **AUG 06 2008**

WAC 97 061 50270

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, initially approved the employment-based immigrant visa petition, and ultimately revoked the approval of the petition following the issuance of two notices of intent to revoke. The Administrative Appeals Office (AAO) dismissed the petitioner's subsequent appeal. The matter is now before the AAO on a combined motion to reopen and 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, a California corporation, states that it is engaged in heavy machinery and technologies research, development and engineering. The petitioner seeks to employ the beneficiary as its president.

The director approved the employment-based immigrant petition on January 27, 1997. After interviewing the beneficiary in connection with his Form I-485, Application to Register Permanent Resident Status of Adjust Status in 1998, and awaiting the results of an overseas investigation, the U.S. Citizenship and Immigration Services (USCIS) Los Angeles District Office returned the petition to the California Service Center for further review and action on October 10, 2003. The director subsequently issued Notices of Intent to Revoke on August 4, 2005 and on December 23, 2005.

After reviewing the petitioner's response to the second Notice of Intent to Revoke, the director revoked the approval of the petition on November 03, 2006. The director concluded that the petitioner had failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The AAO concurred with the director's findings and dismissed the petitioner's appeal in a decision dated August 3, 2007.

The petitioner filed the instant motion to reopen and reconsider on October 30, 2007. The regulation at 8 C.F.R. § 103.5(a)(1)(i) requires that any motion to reopen or reconsider an action by USCIS be filed within 30 days of the decision that the motion seeks to reopen or reconsider, except that failure to file before this period expires may be excused in the discretion of USCIS where it is demonstrated that the delay was reasonable and was beyond the control of the petitioner. If the decision was mailed, the motion must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b).

In accordance with 8 C.F.R. § 103.2(a)(7)(i), an application received in a Citizenship and Immigration Services (CIS) office shall be stamped to show the time and date of actual receipt, if it is properly signed, executed and accompanied by the correct fee. For calculating the date of filing, the motion shall be regarded as properly filed on the date that it is so stamped by the service center. In the present matter, according to the date stamp on the Form I-290B, Notice of Appeal or Motion, the motion was received by the director on October 30, 2007, 88 days after the AAO's decision was issued. Counsel has offered no explanation for the petitioner's failure to file the motion within 33 days of the AAO's adverse decision.

Therefore, as a matter of discretion, the petitioner's failure to file the motion within the period allowed will not be excused as either reasonable or beyond the control of the petitioner. Accordingly, the motion will be dismissed as untimely filed.

Although the motion will be dismissed, the AAO notes that the sole argument presented on motion is the fact that the beneficiary was previously granted L-1A status to work for the petitioner as a nonimmigrant intracompany transferee in a managerial or executive capacity. In this regard, counsel states:

Thus, the beneficiary met the required hierarchy and levels of staffing at the petitioning entity as an executive or manager. Otherwise CIS would not have approved the L-1A petitions twice. Since US Immigration Law does not apply two different standards toward an L-1A status holder and an I-140 beneficiary based on the same company's petitions for the same person, same job title and same duty, revoking the previous approved decision is self-contradictory.

Counsel's argument is not persuasive. 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 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 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 CIS 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, CIS 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).

It is noted that counsel makes no direct reference to the detailed findings made in the AAO's decision dated August 3, 2007 and the specific deficiencies in the petitioner's evidence, which were remarked upon and discussed at length therein. In an attempt to establish that the beneficiary's employment in the United States is in a qualifying capacity, counsel restates the statutory definitions of managerial and executive capacity and provides a brief position description for the beneficiary which paraphrases the definition of "executive capacity" at section 101(a)(44)(B) of the Act. However, with regard to a motion to reconsider, the regulations at 8 C.F.R. § 103.5(a)(3) state the following, 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.

Thus, the purpose of a motion 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 recitation of the beneficiary's proposed employment does not meet the requirements of a motion to reconsider. The AAO previously conducted a *de novo* review of the entire record of proceeding. Any information regarding the beneficiary's proposed employment, particularly his job duties, should have been provided on appeal. There is no regulatory or statutory provision that allows a petitioner more than one appellate decision with respect to the same petition. In the present matter, an appellate decision was issued and the deficiencies were expressly stated. The instant motion fails to indicate how the decision was based on an incorrect application of law or CIS policy, nor is it supported by pertinent precedent decisions. Accordingly, had the motion been timely filed, it would fail to meet the regulatory requirements for a motion to reconsider.

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.

With regard to the motion to reopen, it is noted that that the petitioner has failed to submit any fact that can be deemed new.¹ No new facts are discussed in counsel's latest brief, and the only supporting documentation provided consists of excerpts from the petitioner's parent company's web site printed in October 2007. The claimed "continuous growth" of the petitioner's parent company has no bearing on the issue of whether the petitioner established that the beneficiary would be employed in a managerial or executive capacity as of

¹ The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . ." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

December 1996, when the instant petition was filed. Furthermore, 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. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Accordingly, had the motion been timely filed, it would fail to meet the regulatory requirements for a motion to reopen.

As a final note, the proper filing of a motion to reopen and/or reconsider does not stay the AAO's prior decision to dismiss an appeal or extend a beneficiary's previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

ORDER: The motion is dismissed as untimely filed.