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U.S. Citizenship  
and Immigration  
Services

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B4



FILE:

SRC 03 118 51295

Office: TEXAS SERVICE CENTER

Date:

JAN 03 2008

IN RE:

Petitioner:

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 BENEFICIARY:



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, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The petitioner filed the instant petition seeking 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 petitioner, a Georgia corporation, states that it is engaged in the sale and purchase of fine jewelry. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition on December 29, 2005 based on the petitioner's failure to respond to a request for additional evidence issued on September 30, 2005 within the 12 weeks allowed. The director advised the petitioner that the petition was denied due to abandonment, pursuant to the regulation at 8 C.F.R. § 103.2(b)(13). The director also advised the petitioner that pursuant to 8 C.F.R. § 103.2(b)(15), a denial due to abandonment may not be appealed.

On May 16, 2007, counsel, filed a Form I-290B, Notice of Appeal or Motion. Under Part 2 of the Form I-290B, where asked to indicate whether he is filing an appeal or a motion to reopen and/or reconsider, counsel indicated that he is filing an appeal. It is noted that the brief accompanying the Form I-290B is presented as a "motion to reopen and reconsider." However, if counsel intended to file a motion, he should have so stated on the Form I-290B, rather than indicating that he was filing an appeal.

As noted above, the regulations provide that no appeal lies from the denial of a petition for abandonment. 8 C.F.R. § 103.2(b)(15). As there is no appeal from the director's denial, the petitioner's appeal must be rejected.<sup>1</sup>

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<sup>1</sup> Furthermore, in order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days of after service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). The date of filing is not the date of mailing, but the date of actual receipt. *See* 8 C.F.R. § 103.2(a)(7)(i).

The record indicates that the director issued the decision on December 29, 2005. The instant appeal was received on May 16, 2007, more than 16 months after the director's decision. Accordingly, the appeal was untimely filed. Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. Therefore, even if the petitioner had proper standing to file an appeal in this matter, the appeal would be rejected as untimely filed.

In addition, the AAO notes that counsel indicated on Form I-290B, Notice of Appeal or Motion, that he represents the beneficiary. All of the Forms G-28, Notice of Entry of Appearance as Attorney or Representative, submitted by counsel were signed by the beneficiary. The beneficiary did not indicate that he was signing as an authorized representative of the petitioner, and the petitioner is not named on the Forms G-28 or Form I-290B. Thus, the record shows that counsel represents the beneficiary, not the petitioner. Pursuant to 8 C.F.R. § 103.3(a)(1)(iii), a beneficiary of a visa petition is not an affected party. An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed. 8 C.F.R. § 103.3(a)(2)(v).

Pursuant to 8 C.F.R. § 103.3(a)(2)(iii), the official who made the unfavorable decision shall review the appeal and decide whether favorable action is warranted. Within 45 days of receipt of the appeal, the reviewing official, in this case, the Director, Texas Service Center, may treat the appeal as a motion to reopen or reconsider and take favorable action. In addition, the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. Here, the director declined to treat the appeal as a motion and forwarded the matter to the AAO. Therefore, the remaining issue is whether the petition should be returned to the director to be treated as a motion to re-open.

Pursuant to 8 C.F.R. § 103.5(a)(2), a motion to reopen an application or petition denied due to abandonment must be filed with evidence that the decision was in error because:

- (i) The requested evidence was not material to the issue of eligibility;
- (ii) The required initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or
- (iii) The request for additional information or appearance was sent to an address other than that on the application, petition, or notice of representation, or that the applicant or petitioner advised the Service, in writing, of a change of address or change of representation subsequent to filing and before the Service's request was sent, and the request did not go to the new address. (Paragraph (a)(2) revised 2/10/94; 59 FR 1463)

Here, counsel argues that the matter should be re-opened because: (1) the required evidence was submitted with the petition at the time of filing; and (2) the request for additional evidence was sent to an outdated address. With respect to the first argument, counsel states that all required documentation was included in the file, and also notes that a review of the most recent petition requesting an extension of the beneficiary's L-1A nonimmigrant status, which was approved, would establish the petitioner's eligibility. Upon review, the AAO notes that the initial evidence submitted with the petition was neither complete nor extensive. The director determined that the evidence submitted was insufficient to establish: (1) that the petitioner and the foreign entity have a qualifying relationship; (2) that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity; (3) that the beneficiary would be employed by the petitioner in a primarily managerial or executive capacity; (4) that the foreign entity continues to do business; or (5) that the U.S. company had the ability to pay the proffered wage to the beneficiary as of the date the petition was filed. The AAO concurs with the director's assessment that the petition was not approvable based on the limited evidence submitted at the time of filing.

Counsel's reliance on the approval of the beneficiary's previous L-1A nonimmigrant petitions, and his suggestion that evidence submitted in support of those petitions should have been reviewed, is misplaced. Each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, U.S. Citizenship and Immigration Services (USCIS) is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). If a director requests

additional evidence that the petitioner may have submitted in conjunction with a separate nonimmigrant petition filing, the petitioner is, nevertheless, obligated to submit the requested evidence, as the record of the nonimmigrant proceeding is not combined with the record of the immigrant proceeding. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant 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). 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, and an immigrant E-13 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. **Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A 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).

Counsel's remaining argument is that the petitioner was not properly served either the request for additional evidence issued on September 23, 2005 or the notice of decision issued on December 29, 2005. Counsel asserts that the petitioner never received the request for evidence and was not aware of the denial of the petition until much later, apparently in late 2006 or early 2007. In an affidavit submitted on appeal, the beneficiary states that USCIS was informed of a new address for the petitioner in December 2003, August 2004 and April 2005. In support of this claim, the documentation submitted on appeal contains copies of Forms I-797C, Receipt Notice, for Forms I-131, Application for Travel Document, submitted on behalf of the beneficiary and his spouse in December 2003, August 2004, and April 2005. These documents show a new mailing address for the beneficiary and his spouse.

However, a careful review of the record reveals no evidence that the petitioner ever submitted a letter or other correspondence advising that its mailing address had changed from the address listed on the Form I-140: [REDACTED] Atlanta, Georgia 30329. The fact that the beneficiary and his spouse subsequently filed Forms I-131 on which they identified a different mailing address for themselves is irrelevant. Neither the beneficiary nor his spouse is the petitioner in this matter. The evidence of record clearly shows that the request for evidence and notice of decision were properly sent to the petitioner's address of record. *See* 8 C.F.R. § 103.5a. It is noted that neither the request for evidence nor the notice of decision were returned to USCIS as undeliverable mail. In light of the above, the petitioner has not demonstrated that the request for additional evidence was sent to an address other than the petitioner's address of record.

Further, the AAO notes that, while counsel and the beneficiary state that the petitioner's mailing address changed some time in 2003, the beneficiary does in fact acknowledge receiving correspondence from the USCIS District Office in Atlanta, Georgia, dated April 6, 2006, which was addressed to him at the "old" [REDACTED] address. If the beneficiary was able to receive mail at this address in April 2006, it is unclear why the petitioner would not have received the correspondence sent by the director to this address in September and December 2005. The beneficiary states that the petitioner's internal accountant had health problems during the latter half of 2005 which may have affected the petitioner's ability to receive the

correspondence, but offers no further explanation as to why the company would not consistently have a reliable employee in place to receive and open mail addressed to it.

Based on the foregoing discussion, the AAO finds that the evidence submitted on appeal does not meet the requirements of a motion to reopen a petition that was denied due to abandonment. Therefore, there is no requirement to treat the appeal as a motion.

As the director's decision was not appealable, and as the appeal does not qualify as a motion, the appeal must be rejected.

**ORDER:** The appeal is rejected.