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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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[Redacted]

File: [Redacted] Office: NEBRASKA SERVICE CENTER Date: **NOV 03 2009**
LIN 07 162 50839

IN RE: Petitioner: [Redacted]
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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed.

The petitioner is a corporation organized under the laws of the State of Florida that claims to operate a communications business. It seeks to employ the beneficiary as its executive manager. 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 on September 29, 2008, determining that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity by the United States entity.

In denying the petition, the director noted that the petitioner has provided different job titles for the beneficiary at different times, thus U.S. Citizenship and Immigration Services (USCIS) is unable to determine the beneficiary's actual job title. In addition, the director noted a number of other inconsistencies in the record, including the job title of another key employee in the company's chain of command and the actual number of employees on staff. The director also found that the petitioner had submitted a vague and non-specific job description which fails to sufficiently describe the beneficiary's duties and responsibilities. Further, the director found that although the petitioner claimed that the beneficiary will manage subordinate employees, the record lacks information regarding the duties of the other employees, without which it cannot be concluded that the beneficiary has been or will be relieved of the need to perform non-qualifying duties. The director also found that the evidence does not establish that the U.S. entity has the organizational complexity to warrant the services of the beneficiary in an executive/manager position.

On the appeal brief filed on December 3, 2008, counsel for the petitioner contends that the director's "determination that the proposed job duties [of the beneficiary] do not meet the definition of 'managerial capacity' is arbitrary and capricious and constitute reversible error." Counsel notes that USCIS has previously granted several L-1 petitions on behalf of the beneficiary and asserts the beneficiary's U.S. position continues to meet all four regulatory criteria for managerial status, for purposes of the present petition. Counsel claims that the director's decision "relies on minor inconsistencies and oversights in the documentation and preparation of the petition by prior counsel." Counsel acknowledges that "the petition could have been prepared with greater attention to detail," but contends that "these minor mistakes" do not justify the denial of the claim. However, counsel offers no explanation or clarification for the inconsistencies and deficiencies in the record that the director identified in his decision. Counsel claims that the petitioner has met its burden of proving eligibility for the requested benefit by a preponderance of the evidence. Counsel submitted no additional evidence on appeal.

The AAO concurs with the director's conclusion that the record does not demonstrate that the beneficiary will be employed in a primarily managerial or executive capacity in the United States.

As the director noted in his decision, there are a number of material inconsistencies in the record that have not been addressed by the petitioner. The petitioner identified the beneficiary's title as "executive manager" in the Form I-140, Immigrant Petition for Alien Worker, as "agency manager" in its letter dated May 9, 2007, as "manager" in the offer of employment dated May 2, 2007, and as "creative and art director" in another job description submitted with the initial petition and in an organizational chart submitted in response to a request for further evidence (RFE) by the director. Nowhere in the record does the petitioner clarify which is the correct title for the beneficiary's proffered position in the United States. In addition, along with the Form I-140, the petitioner submitted two different descriptions for the beneficiary's position in the United States, the May 9, 2007 letter and May 2, 2007 offer of employment lists one set of duties attached to the position of "agency manager" or "manager," while another document purporting to describe the U.S. team listed an entirely different set of duties for the beneficiary in the role of creative and art director. Again, the petitioner has made no attempt to explain or reconcile these two different sets of duties that have been attributed to the beneficiary's position in the U.S. company.

Further, as the director noted, another key employee in the company, [REDACTED], was listed in a document submitted with the initial petition as a photography & production director, reporting to the beneficiary as creative director, and later appeared on the organizational chart for the U.S. company as the chief operating officer, to whom the beneficiary reported. In addition, the petitioner's claims regarding the number of employees working for the U.S. company also fluctuated from 8 on the Form I-140, to 4 (one full-time and three part-time) in the letter dated May 9, 2007 and the description of the U.S. team submitted with the Form-140, to 9 on the organizational chart submitted in response to the RFE. Again, no explanation has been provided with regard to these inconsistencies.

Contrary to counsel's claim on appeal, the inconsistencies in the record discussed above are not "minor mistakes." To the extent they relate to the title and duties of the beneficiary's position in the U.S. company, and to the organizational structure of the U.S. company itself, they are directly relevant to the determination of whether the beneficiary will function primarily in a managerial or executive capacity in the United States. As such, the director's denial of the petition based on these unaddressed deficiencies in the record does not constitute error. Further, other than acknowledging their existence in the record and dismissing them as "minor," counsel has failed to provide any explanation or additional evidence to reconcile or clarify these inconsistencies. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO recognizes that USCIS previously approved an L-1A nonimmigrant visa petition filed by the petitioner on behalf of the beneficiary, and notes that this issue was thoroughly addressed in the

director's decision. As noted by the director, in general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by USCIS 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. Because USCIS 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).

Moreover, 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). The prior nonimmigrant approvals do not preclude USCIS 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. USCIS denies many I-140 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 at 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. at 1103.

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory 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). Due to the material inconsistencies in the present record, the AAO finds that the director was justified in departing from the previous nonimmigrant approval by denying the present immigrant petition. Further, the director provided ample explanation for his departure from the previous nonimmigrant approvals.

The regulation at 8 C.F.R. § 103.3(a)(1)(v) states, in pertinent part: "An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal."

As the petitioner has failed to address on appeal the material inconsistencies in the record discussed above, or any of the other reasons for denial that the director has cited in his decision, the petitioner

has failed to identify an erroneous conclusion of law or a statement of fact in the director's decision as a basis for the appeal. Thus, the regulations mandate the summary dismissal of the appeal.

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 appeal is summarily dismissed.