

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy  
**PUBLIC COPY**

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

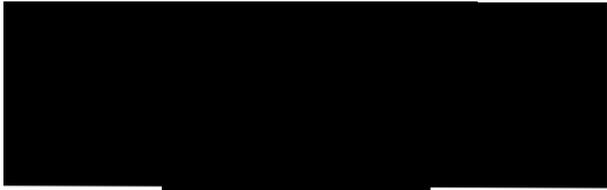


U.S. Citizenship  
and Immigration  
Services

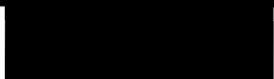
B4

MAY 01 2009

MAY 01 2009



FILE:



OFFICE: NEBRASKA SERVICE CENTER

Date:

LIN 07 166 51875

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 PETITIONER:



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, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Florida corporation seeking to employ the beneficiary as its senior underwriter 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 based on the finding that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's conclusion, asserting that the regulation upon which the director relied is inconsistent with the relevant statutory provision. The director's findings and counsel's arguments will be addressed in a full discussion below.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 which 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.

The primary issue in this proceeding call for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the petitioner has established that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the Form I-140, the petitioner submitted a letter dated May 8, 2007, stating that the beneficiary was employed abroad in the position of regional underwriter specializing in catastrophe management. The petitioner provided the following description of the beneficiary's foreign employment:

[The beneficiary] monitored and analyzed the entire region's catastrophe aggregates—the accumulation of risks and insured values exposed to natural hazards such as hurricanes, earthquakes, floods, and windstorms for a specific geographic area. . . . This position required specialized knowledge of Ace Latin America's catastrophe program, and its application to Latin American markets.

On August 21, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a description of the job duties the beneficiary performed during his employment abroad. The petitioner was also asked to provide the foreign entity's organizational chart illustrating the staffing levels and identifying the beneficiary and any subordinates.

In response, the petitioner provided a letter from counsel dated September 17, 2007, briefly addressing the director's request. The petitioner also submitted a separate undated document containing a full list of the beneficiary's foreign job duties and his salary range. As the director restated this list, in its entirety, in the denial, the AAO need not repeat the same information in this decision. The petitioner also provided the requested organizational chart for the foreign entity, which shows the president/chief executive officer (CEO) as the head of the company. The next tier consists of three branch managers and eight department managers, one of whom is the beneficiary's direct superior. The beneficiary, along with two other "managerial" employees, appear to be supervised by the "P & C Manager," a job title that is not explained further. Finally, the bottom tier of the hierarchy includes the beneficiary's subordinate, a technical assistant.

The director denied the petition finding that the beneficiary primarily performs the duties associated with providing underwriting services. The director concluded that such duties are not managerial, despite the claim that the beneficiary was employed in a managerial capacity.

**On appeal, counsel does not dispute the director's finding. Rather, counsel argues that U.S. Citizenship and Immigration Services (USCIS) applied a regulation that is *ultra vires*, because it goes beyond the requirements specified in section 203(b)(1)(C) of the Act, which, according to counsel, does not require the petitioner to establish that the beneficiary's employment abroad was within a qualifying managerial or executive capacity.**

The AAO has considered the evidence of record and finds counsel's argument to be entirely without merit. First, the AAO lacks the authority to deem any regulation *ultra vires*. As such, the AAO is not the proper venue for the type of relief counsel is currently seeking. If counsel wishes to further challenge the propriety of a federal regulation, she must do so in federal court.

Second, even if the AAO had the requisite authority to entertain an *ultra vires* challenge of a federal regulation, counsel's argument would fail. Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). Statutory language must be given conclusive weight unless the legislature expresses an intention to

the contrary. *Int'l. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987). The plain meaning of the statutory language should control except in rare cases in which a literal application of the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR*, 930 F.2d 975 (2d Cir.), *cert. denied*, 112 S. Ct. 416 (1991).

In addition, we are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We are to construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996).

In looking at section 203(b)(1)(C) of the Act, it specifically states that the alien will enter the United States "in order to continue to render services . . . in a capacity that is managerial or executive." It is therefore clear from the plain language of the statute that the alien must have been performing in a managerial or executive capacity abroad in order for he or she to "continue to render services" in such a capacity. As such, the AAO does not find any ambiguity. If any ambiguity were determined to exist, however, the authority to fill in any gap would be entrusted to the federal agency.

In general, a federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Even if statutory or regulatory language is ambiguous, deference is usually given to the agency's interpretation. *See United States v. Moses*, 94 F.3d 182, 185 (5<sup>th</sup> Cir. 1996).

*Defensor v. Meissner*, 201 F.3d 384, 386 (5<sup>th</sup> Cir. 2000). In reviewing the agency's regulatory process in interpreting this section of the act during the promulgation of its regulations, the following statements that accompanied the rule in the Federal Register are particularly relevant in addressing counsel's argument:

The language of the statute, however, is specific in limiting this provision to only those executives and managers who have previously worked for the business 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. This regulation reflects the statute and follows criteria long in place for the adjudication of petitions for nonimmigrant intra-company transferees, and immigrant petitions under current Schedule A/Group IV, for such managers and executives.

Keeping in mind that Congress stressed the need of business to transfer key personnel from around the world, and paralleling current regulations, this regulation requires that the prior qualifying one year be outside the United States.

56 Fed. Reg. 30703, 30705 (July 5, 1991)(Proposed Rule).

It is apparent that counsel's interpretation of section 203(b)(1)(C) of the Act fails to take into account the clear intent of Congress to limit the multinational managerial or executive category to those individuals who have already assumed managerial or executive positions abroad. While the express language of the statute already specifies this requirement, the above discussion clarifies congressional intent and lays down the foundation for 8 C.F.R. § 204.5(j)(3)(i)(B), which states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to his entry to the United States as a nonimmigrant to work for the same employer. The director properly applied the relevant regulatory provision in assessing the petitioner's eligibility. As counsel does not dispute the director's conclusion that the petitioner failed to meet the eligibility requirement specified in 8 C.F.R. § 204.5(j)(3)(i)(B), the AAO hereby affirms the director's denial of the petition.

Furthermore, while not addressed in the director's decision, the AAO finds that there is at least one additional ground for denial. Specifically, the regulation at 8 C.F.R. § 204.5(j)(5) requires the petitioner to provide a written job offer that includes a detailed description of the job duties to be performed by the beneficiary under an approved petition. Precedent case law supports USCIS's consideration of the job description when examining the executive or managerial capacity of the beneficiary, finding that the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990). In the present matter, the record lacks a detailed description of the beneficiary's proposed job duties. Rather, the petitioner merely stated that the beneficiary analyzes and manages financial information, is responsible for various lines of the petitioner's insurance coverage, oversees accounts, and manages the company's budget. However, these statements are not sufficient to determine the specific daily tasks the beneficiary would perform on a daily basis.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional grounds of ineligibility discussed above, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.