

U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave. N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY



By

DATE: **JUN 13 2012** OFFICE: TEXAS SERVICE CENTER

FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Do not file any motion directly with the AAO. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner is a Delaware limited liability company that seeks to employ the beneficiary as its chief executive officer (CEO). 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.

In support of the Form I-140 the petitioner submitted a statement, which included relevant information addressing the petitioner's eligibility and the beneficiary's foreign and U.S. employment.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for additional evidence (RFE) dated December 23, 2009 instructing the petitioner to provide numerous documents in an effort to elicit relevant information pertaining to the beneficiary's employment abroad.

The petitioner responded, providing a statement dated March 17, 2010 accompanied by supplemental documents addressing the director's various concerns.

After reviewing the record, the director concluded that the petitioner failed to establish eligibility and therefore denied the petition in a decision dated May 5, 2010. The director issued two adverse findings with regard to the beneficiary's employment abroad. First, the director determined that the petitioner failed to establish that the beneficiary was employed abroad for the statutorily mandated duration of one year during the three years directly prior to the filing of the instant petition. Second, regardless of the time period of the beneficiary's foreign employment, the director determined that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

On appeal, counsel submits a brief disputing the denial. Counsel asserts that the director improperly relied on the date of the I-140 filing as the proper basis for determining the relevant three-year period during which the qualifying foreign employment must be established. Counsel also restates the list of the beneficiary's job responsibilities in his position with the foreign entity, Incapsulate, Inc., contending that the beneficiary was employed in a qualifying managerial or executive capacity.

The AAO finds that counsel's statements on appeal are not persuasive and fail to overcome the director's denial. It is noted that all of the petitioner's submissions have been reviewed. All relevant documentation that pertains directly to the key issue in this matter will be fully addressed in the 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.

As noted above, the two primary issues to be addressed in this proceeding pertain to the beneficiary's employment with the foreign entity. Specifically, the AAO will examine the record to determine whether the petitioner submitted sufficient evidence to establish that the beneficiary was employed abroad for the required amount of time within the requisite time period, and if so, whether such employment was 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.

First, the AAO will address the beneficiary's period of employment abroad. The AAO notes the regulation at 8 C.F.R. § 204.5(j)(3)(i), which states, in part, the following:

- A) If the alien is outside the United States, in the three years preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity[.]

The clear language of the statute indicates that the relevant three-year period is that "preceding the time of the alien's application for classification and admission into the United States under this subparagraph." § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C). The statute, however, is silent with regard to aliens who, like the beneficiary, have already been admitted to the United States in a nonimmigrant classification.

In promulgating the regulations on section 203(b)(1)(C) of the Act, the legacy Immigration and Naturalization Service (INS) concluded that it was not the intent of Congress to exclude L-1A multinational managers or executives who had already been transferred to the United States from this

employment-based immigrant classification. Specifically, INS stated the following with regard to the interpretation of the Congressional intent behind the relevant statutory provisions:

The Service does not feel that Congress intended that nonimmigrant managers or executives who have already been transferred to the United States should be excluded from this classification. Therefore, the regulation provides that an alien who has been a manager or executive for one year overseas, during the three years preceding admission as a nonimmigrant manager or executive for a qualifying entity, would qualify.

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

In other words, for those aliens who are currently in the United States in L-1A status, the relevant time period mentioned in the statute should be the three-year period preceding the time of the alien's application and admission as (or change of status to) an L-1A multinational managerial or executive classification.

In light of the above, the AAO finds that neither counsel, who asserts that the three-year time period that ended on March 3, 2006 must be considered, nor the director, who determined that the three year period prior to the date the petition was filed must considered, was correct.

The AAO finds counsel's statutory interpretation to be incorrect because it is based on the unsupported presumption that the beneficiary was "working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas." 8 C.F.R. § 204.5(j)(3)(i)(B).. The record simply does not support counsel's assertion. The TN nonimmigrant visa allows a citizen of Canada to enter the United States temporarily to engage in business at a professional level in accordance with the North American Free Trade Agreement. 8 C.F.R. § 214.6(a). The TN visa classification encompasses a large number of professions, such as accountants, architects, and engineers. 8 C.F.R. § 214.6(c).

The record indicates that the beneficiary was present in the United States in TN status on a fairly continuous basis from January 26, 2000, until July 3, 2009. The one break in this period occurred from December 29, 2004 until December 31, 2005, when the beneficiary indicates that he made only short visits to the United States in B-1 and H-4 nonimmigrant status.

To determine whether the beneficiary was working in the United States for the same employer or a subsidiary or affiliate of the firm that employed him overseas, the director requested copies of the paperwork submitted by the beneficiary in support of the TN classification, specifically including the employment letters from the U.S. companies.

In response, the petitioner only submitted three letters. The letters from [REDACTED] stated that the beneficiary was employed as a TN "Computer Systems Analyst" by these companies from 2003 to 2004 and 2007 to 2008. The letters specifically indicate that the two companies directly employed the beneficiary as a TN; there is no indication that they contracted with the Canadian entity for the beneficiary's services. Only the third letter from [REDACTED] states that it has contracted with the

Canadian company for the services of the beneficiary as a Computer Systems Analyst, for the period November 2007 until November 2008.<sup>1</sup>

The AAO recognizes that TN nonimmigrants are prohibited from self-employment. *See* 8 C.F.R. § 214.6(b) (defining “engage in business activities at a professional level”). It is noted that the petitioner failed to submit employment letters for the beneficiary’s remaining five-year period of stay in the United States in TN status. The petitioner also declined to submit the beneficiary’s Canadian tax returns, contrary to the director’s request.<sup>2</sup> *See* Petitioner’s RFE Response, Exhibit F at page 3. All of these documents might have reasonably demonstrated the nature of the beneficiary’s employment and whether he was working for a related company in the United States. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Based on the [REDACTED] letters covering 2004 and 2007, and the absence of evidence for the remaining period of time, the petitioner has not established that the beneficiary was working for the petitioner or a related company while in TN status. Accordingly, the beneficiary’s employment as a TN must be deemed interruptive and non-qualifying.

Notwithstanding this conclusion, the AAO finds that the director was incorrect in his reliance on the date of filing of the instant Form I-140 to determine the relevant three-year time period. The director failed to properly consider the fact that the beneficiary was already present in the United States as an L-1 nonimmigrant working for the petitioning entity at the time the instant petition was filed. Therefore, contrary to the assertions of both counsel and the director, the beneficiary fits the criterion described in 8 C.F.R. § 204.5(j)(3)(i)(B) and thus must have his period of employment abroad analyzed based on the date he obtained a change of status to that of an L-1 nonimmigrant, or November 13, 2008.

In light of the above, the relevant three-year time period during which the beneficiary’s one year of foreign employment must have occurred is from November 13, 2005 until November 13, 2008. Based on counsel’s statements and the documentation offered by the petitioner, the beneficiary worked in the United States in TN status from at least December 31, 2005 through July 3, 2009. Thus, while the beneficiary may have been employed for at least one year, he could not have worked abroad for longer than forty-eight consecutive days within the relevant three-year time period. The beneficiary must

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<sup>1</sup> While the [REDACTED] letter is the only letter to reference the Canadian company, it is noted that [REDACTED] shares an address and office suite with the petitioning company in Vienna, VA. The relationship between these two companies is not clear.

<sup>2</sup> The petitioner did submit partial copies of select tax returns to show that the Canadian entity, [REDACTED], has been doing business abroad. Petitioner’s RFE Response, Exhibit K. Among these documents, the petitioner submitted the beneficiary’s 2003 Canadian Tax Form T-2124 (“Statement of Business Activities”). However, rather than demonstrating that [REDACTED] was doing business, the beneficiary indicated on the Form T-2124 that he provided software engineering services for a different company named [REDACTED] located in Ontario, Canada. Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

physically work abroad to satisfy the one-year requirement. *Matter of Kloeti*, 18 I&N Dec. 295 (Reg'1 Comm'r 1981).

Additionally, the AAO finds that even if the petitioner were to establish that the beneficiary had the requisite time period of foreign employment, the record does not establish that such employment was in a qualifying managerial or executive capacity.

As a preliminary matter, the AAO finds that in order to fully assess the beneficiary's executive or managerial capacity in a given position, the description of the job duties pertaining to the position in question must first be examined. *See* 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined job description, as 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 AAO finds that the petitioner offered deficient job descriptions that failed to effectively convey a meaningful understanding of the specific tasks the beneficiary performed abroad. Rather, the petitioner provided general information pertaining primarily to the beneficiary's discretionary authority without providing a comprehensive account of the beneficiary's actual daily tasks. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.* Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient.

Here, the petitioner has failed to clarify what specific tasks the beneficiary performed in the course of managing the day-to-day business, establishing organizational goals and objectives, providing leadership on new initiatives, fostering a success-oriented environment, keeping abreast of technological developments, or engineering the alignment of people, processes, policies and assets. These vague statements simply fail to reveal what the beneficiary might have done on a daily basis in the execution of his job duties. Although the beneficiary's discretionary authority is one key aspect to establishing his managerial or executive capacity, the information provided is not sufficient to affirmatively conclude that the beneficiary's employment abroad was primarily comprised of qualifying managerial- or executive-level tasks.

A critical analysis of the nature of the petitioner's business undermines the petitioner's assertions. Rather, it appears from the record that the Canadian entity primarily served a payroll and tax function for the beneficiary while he served as a TN computer analyst in the United States. The AAO must note that the employment letters from [REDACTED] consistently state that the beneficiary was employed as a "Computer Systems Analyst." Based on this evidence, the AAO concludes that it is more likely that the beneficiary spent the majority of his time working as a computer analyst. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. An

employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm’r 1988).

If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Accordingly, in light of the deficiencies that have been discussed in this decision, the AAO finds that the petition does not warrant approval and the director’s decision will be affirmed.

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.