

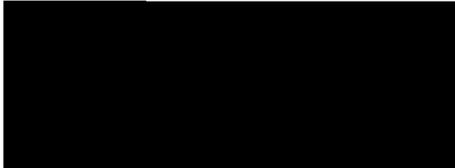
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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DATE: **MAR 26 2012** OFFICE: TEXAS SERVICE CENTER



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: SELF-REPRESENTED

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. 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 Florida corporation that seeks to employ the beneficiary as its vice president. 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 determined that the petitioner failed to establish that the beneficiary entered 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." Section 203(b)(1)(C) of the Act.

On appeal, the petitioner disputes the director's decision, asserting that there is no statutory or regulatory provision that requires the petitioner to establish that the beneficiary would commence employment for the petitioning entity immediately subsequent to his or her arrival to the United States.

The primary issue in this proceeding is whether the petitioner established eligibility for immigrant classification under section 203(b)(1)(C) of the Act despite the fact that the beneficiary was not employed by the U.S. petitioner or its parent, subsidiary, or affiliate immediately following his entry to the United States.

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 petitioner's Form I-140 indicates that the beneficiary arrived in the United States on September 15, 2005 and further shows that at the time the petition was filed, the beneficiary's nonimmigrant classification was that of a J-1 exchange visitor. The supporting evidence included, but was not limited to, a letter discussing the beneficiary's employment with a qualifying foreign employer and evidence of a qualifying relationship between the petitioner and the beneficiary's foreign employer.

On March 28, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide the foreign employer's payroll records pertaining to the beneficiary's last year of employment with that entity.

In response, the petitioner provided monthly salary statements from October 2002 through November 2003 showing the beneficiary as the named employee and the beneficiary's gross and net earnings during each month. The statements for October and November 2002 are dated July 11 and 12, 2002, respectively, thus predating the time period during which the income was allegedly earned. The statements from December 2002 through November 2003 are all dated on various days of July 2003. Thus, with regard to the statements that purport to account for the beneficiary's salary from August through November 2003, the statements predate the time period during which the income was allegedly earned. The petitioner did not provide an explanation that would clarify the connection between the month for which the salary statement was meant to account for and the date shown on the statement itself. *See Matter of Ho*, 19 I&N Dec. at 591-92.

In a follow-up notice of intent to deny issued on May 12, 2009, the director instructed the petitioner to provide a copy of Form DS-2019 showing the entity that sponsored the beneficiary in his J-1 exchange visitor status. The petitioner was also asked to provide evidence of the beneficiary's employment subsequent to his employment with the petitioner's foreign subsidiary.

In response, the petitioner provided a copy of Form DS-2019, which shows that the beneficiary's J-1 sponsor was [REDACTED] and that the time period for the beneficiary's J-1 status with the said entity was from September 15, 2005 through March 14, 2007. The petitioner also provided employment verification letters indicating that the beneficiary was employed by [REDACTED] in the United Kingdom from November 24, 2003 until September 6, 2005 followed by his employment for [REDACTED] from September 17, 2005 until March 6, 2007.

In a decision dated July 27, 2009 the director denied the petition, concluding that the petitioner failed to establish that the beneficiary is eligible for immigrant classification under section 203(b)(1)(C) of the Act because the beneficiary did not "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." *Id.* The director reviewed the beneficiary's employment history after his employment with the qualifying foreign employer ceased and determined that neither of the two entities that employed the beneficiary during the interim period, i.e., prior to the filing of the instant Form I-140, could be deemed as "the same employer or a subsidiary or affiliate thereof in a capacity that is managerial or executive." The director also pointed out that the beneficiary was ineligible for J-1 nonimmigrant classification based on the evidence showing that the sponsoring entity which was identified in the beneficiary's Form DS-2019 was not the same entity that employed the beneficiary during the covered period.

On appeal, the petitioner asserts that the director imposed an undue burden on the petitioner requiring the petitioner to establish that the beneficiary was employed by the U.S. entity immediately subsequent to his

arrival in the United States. The petitioner states that the director's interpretation of the statutory use of the word "continue" was erroneous and further contends that the very definition of the term "continue" implies an interruption and subsequent resuming of the prior employment. Lastly, the petitioner points out that the beneficiary has since attained L-1A status and is currently employed by the U.S. entity.

After reviewing the evidence of record and the arguments submitted on appeal, the AAO concludes that the petitioner's arguments fail to overcome the basis for denial.

First, with regard to the beneficiary's current employment for the U.S. petitioner in L-1A nonimmigrant status, the record shows that the beneficiary was not in L-1A status at the time the instant petition was filed. While the Form I-140 in the present case was filed in July 2007, the petitioner's Form I-129 petition for nonimmigrant worker was not approved until November 16, 2007. It is noted that 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'r. 1971). As such, the AAO cannot consider (for the purpose of determining the petitioner's eligibility) an event, i.e., approval of the petitioner's Form I-129, which did not occur until after the instant Form I-140 was filed.

Second, the AAO finds that the petitioner erroneously relied on the single term "continue" without reading the statutory provision as a whole, which expressly states that in order to merit the immigrant classification of multinational manager or executive the beneficiary must be one "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." Section 203(b)(1)(C) of the Act. The petitioner's focus on the term "continue" fails to account for the key requirement that precedes this term, i.e., that the purpose of the beneficiary's U.S. transfer must be to work for the petitioning U.S. entity. Thus, while it is true that the term "continue" implies an interruption and subsequent resuming of some activity, the express statutory provisions preclude an open-ended interpretation as to the type of interruption that is permitted. The very fact that the beneficiary's employment for the foreign entity abroad would cease in itself implies an interruption in employment with the intent to resume employment with "the same employer or a subsidiary or affiliate thereof" in the United States under an approved visa petition. *Id.* The petitioner has simply failed to cite to any statute, regulation, or precedent case law to support the arguments that are being offered on appeal.

Moreover, the petitioner fails to meet the statutory provisions that require the beneficiary to establish employment with the qualifying entity abroad for one year within a qualifying three-year period prior to the petitioner's filing of the Form I-140 seeking U.S. employment of the beneficiary.

The regulation at 8 C.F.R. § 204.5(j)(3)(i) 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 have already been admitted to the United States in a nonimmigrant classification. In promulgating the regulations implementing 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.

The record shows that the beneficiary's status was changed to that of an L-1A intracompany transferee only after the instant petition was filed. As stated earlier, the record also shows that the beneficiary last entered the United States on September 15, 2005 as a J-1 nonimmigrant. Thus he did not enter the United States for the purpose of "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." Accordingly, the beneficiary does not fit the criterion described in 8 C.F.R. § 204.5(j)(3)(i)(B) and must have his period of employment abroad analyzed under the criterion described at 8 C.F.R. § 204.5(j)(3)(i)(A), which states that the relevant three-year time period is that which falls within the three years prior to the filing of the instant petition. As the instant petition was filed in July of 2007 and it is well established that the beneficiary's employment with the qualifying entity abroad ceased in November 2003, it cannot be concluded that the beneficiary was employed abroad during the relevant three-year time period, regardless of whether or not the petitioner is able to provide evidence of the beneficiary's qualifying employment abroad.

Additionally, the petitioner asserts that the director's statutory interpretation would deny the immigration benefit sought herein to many L-1A beneficiaries who are in the United States and not employed by "the same employer or a subsidiary or affiliate thereof." This argument is not valid, however, as only those beneficiaries whose eligibility the petitioner is able to establish under section 203(b)(1)(C) of the Act and applicable regulatory provisions discussed at 8 C.F.R. § 204.5(j) will merit the employment based visa classification of multinational manager or executive.

In summary, the AAO finds that the petitioner has failed to establish that, at the time the Form I-140 was filed, the beneficiary met the basic statutory requirements that would require further scrutiny under relevant regulatory provisions. Accordingly, the AAO concludes that the petitioner is ineligible for the immigration benefit sought herein and the petition cannot be approved.

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.