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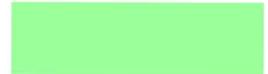
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



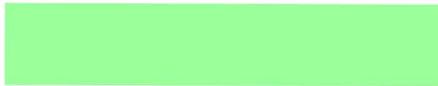
U.S. Citizenship
and Immigration
Services



DATE: JUN 17 2013 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting 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 pharmacy which seeks to employ the beneficiary as its 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.

On March 25, 2010, the director denied the petition concluding that: (1) the petitioner failed to establish the beneficiary came to the United States to continue to render services to the same employer in a managerial or executive capacity, and (2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

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 director noted in his decision that the beneficiary entered the United States in H-1B status and was employed by [REDACTED]. The director also noted that at the time the beneficiary first entered the United States in H-1B status, [REDACTED] was not related to the beneficiary's foreign employer. The petitioner contends the petitioner is a successor-in-interest of [REDACTED] and thus, the beneficiary did enter the United States to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive. However, the foreign employer did not purchase [REDACTED] until December 20, 2007, over one year after the beneficiary entered the United States in H-1B status.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal 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. The record shows that the petitioner last entered the United States on September 29, 2006 as an H-1B nonimmigrant to work for [REDACTED]. At that time, [REDACTED] did not have any relationship with the beneficiary's foreign employer. 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."

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary"). In this case, the petitioner did not establish that the beneficiary's employer when he first entered into the United States had a qualifying relationship with the beneficiary's foreign employer.

Thus, the petitioner did not establish that the beneficiary is a priority worker as defined in Section 203(b) of the Act.

On appeal, the petitioner also states that the "time spent by beneficiary in H-1B status in the United States must be viewed as interruption of employment with overseas subsidiary." However, the beneficiary was not in the United States on behalf of the same employer or on a brief trip for business or pleasure. As noted above, when the beneficiary first entered the United States, he was employed by a company that was not connected to the foreign company. A qualifying relationship with the petitioner and the foreign company did not occur until December 22, 2007, over one year after the beneficiary entered the United States.

Beyond the decision of the director, the petitioner failed to establish that the beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years immediately preceding the filing of the petition.

The director asserts that proper time period to review is the beneficiary's employment abroad in light of the fact that it took place within three years of the beneficiary's lawful admission into the United States in an H-1B nonimmigrant visa category. The AAO will withdraw the director's statements regarding the three-year time period reviewed for the instant case since the director used the incorrect three-year time period in his analysis.

The beneficiary was employed by the foreign company in the position of General Manager from July 2004 until March 2006. The beneficiary entered the United States in H-1B nonimmigrant classification on September 29, 2006. This petition was filed on August 17, 2009. The petitioner contends that the beneficiary possesses at least one year of qualifying experience, from July 2004 through March 2006, outside the United States as General Manager of the foreign company, a managerial position, within 3 years before his entry into the United States as an H-1B nonimmigrant.

The beneficiary did not, however, enter the United States in H-1B nonimmigrant classification to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive. The petitioner did not establish that at the time the beneficiary entered the United States to work in H-1B nonimmigrant classification as an Intern for [REDACTED] the petitioning company had a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary"). In this case, the petitioner did not establish that the beneficiary's employer when he first entered into the United States has a qualifying relationship with the beneficiary's foreign employer.

Furthermore, even if the petitioner could prove that the beneficiary entered the United States as an H-1B nonimmigrant to work with the beneficiary's foreign employer, or a company that has a qualifying relationship with the foreign company, it still cannot establish that the beneficiary was working in a managerial or executive capacity when he was in the United States in H-1B nonimmigrant classification.

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." *See* 56 Fed. Reg. 30703, 30705 (July 5, 1991) (emphasis added).

The beneficiary was employed as an intern when he was first employed in the U.S. in H-1B nonimmigrant classification. The petitioner did not provide a job description for this position and did not establish that the beneficiary was in a managerial or executive capacity.

In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *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); *see also* 8 C.F.R. § 204.5(j)(5). USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified

responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Upon review of the petition and evidence, the petitioner has not established that the beneficiary was employed in a managerial or executive capacity when he entered the United States in H-1B nonimmigrant classification.

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.