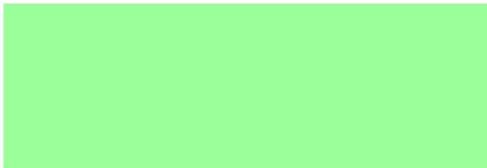


(b)(6)

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

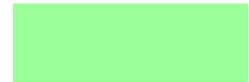


U.S. Citizenship
and Immigration
Services

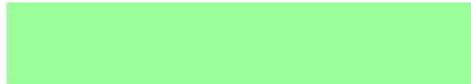


DATE **MAY 30 2013** OFFICE: NEBRASKA SERVICE CENTER

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.

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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the matter will be remanded for further consideration.

The petitioner is a multinational corporation with a total income of over \$2 million. It operates in the United States as a business process outsourcing company that assists other companies to increase revenues through outsourcing. The petitioner seeks to employ the beneficiary in the position of vice president of operations. 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 a decision dated September 18, 2012, the director denied the petition based on the determination that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director pointed to what he deemed to be inconsistencies in the record with regard to the petitioner's organizational composition and determined that the petitioner lacked the organizational complexity to employ the beneficiary in a qualifying 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 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.

On appeal, counsel asks the AAO to review supplemental documentation, which addresses the organizational anomalies that the director discussed in the denial. Counsel also provides a comprehensive appellate brief thoroughly expounding key issues, including the petitioner's changing organizational hierarchy, the petitioner's placement within that hierarchy, and the tasks the beneficiary would be performing within the hierarchy as it existed at the time the petition was filed. Additionally, with the submission of the brief and supporting evidence, counsel clarified and resolved the anomalies the director pointed to in the earlier decision. In sum, counsel clarified the beneficiary's proposed position, establishing that while the beneficiary's position would be comprised of both qualifying and non-qualifying tasks, he would allocate his time primarily to overseeing a staff of professional and managerial employees. The AAO notes that the petitioner does not have the burden of establishing that the beneficiary's time would be allocated entirely to tasks within a qualifying capacity so long as the petitioner is able to demonstrate that the beneficiary would primarily perform managerial- or executive-level tasks. 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. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Pursuant to a thorough review of the supporting evidence, the AAO does not find that the beneficiary's position title was inflated. Rather, the AAO finds that the position title accurately depicts the beneficiary's position and remains consistent with the beneficiary's list of assigned job duties, which were adequately described such that would allow for the conclusion that the beneficiary would more like than not engage in the performance of primarily qualifying managerial-level tasks.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act. If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Section 101(a)(44)(A)(iii) of the Act.

In order to determine whether a beneficiary would be employed in a qualifying managerial or executive capacity, the AAO finds that it is essential to conduct a comprehensive review of a totality of the evidence, starting first with the beneficiary's job description and continuing by considering the job description in light of the nature of the business conducted, the company's organizational and personnel structure, and the beneficiary's specific role and position with the hierarchy.

In the present matter, the AAO is satisfied with the degree of detail provided with regard to the beneficiary's job duties and finds that the organizational hierarchy and the beneficiary's placement therein, as portrayed in the petitioner's submissions, indicate that the beneficiary has been positioned to oversee the work of a managerial staff and that the organization is adequately staffed to relieve the beneficiary of having to allocate his time primarily to the performance of daily non-qualifying tasks.

Accordingly, the AAO finds that the petitioner provided sufficient documentation to overcome the basis for denial.

Notwithstanding the above, the AAO finds that the petition does not warrant approval on the basis of the evidence that is currently on record. Specifically, the AAO finds that the petitioner has failed to establish that it has the statutorily required 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").

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

* * *

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In the present matter, the petitioner claimed in counsel's statement dated January 12, 2012 that [REDACTED] owns 100% of the U.S. entity. However, in a July 21, 2007 minutes of meeting, it was resolved that [REDACTED] would receive 67% of the petitioner's total issued shares and that [REDACTED] would receive the remaining 33% of the issued. A separate document signed by both [REDACTED] acknowledged that [REDACTED] owns 100% of the U.S. entity's shares. The record does not show that any stock certificates were issued or cancelled to document any of these transactions.

The petitioner has also provided copies of its IRS Forms 1120, U.S. Corporation Income Tax Return, for the years 2007 through 2010. Each Form 1120 at schedules E and K identifies [REDACTED] rather than [REDACTED] as the sole shareholder of the petitioning company. 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). As noted above, the petitioner has not submitted stock certificates or other primary evidence of its ownership in support of the petition.

In light of the grave inconsistency in the record with regard to ownership of the petitioning entity, the AAO cannot conclude that the petitioner has established that it has the claimed affiliate relationship with the foreign entity where the beneficiary had been previously employed. Therefore, the petition cannot be approved on this basis. Further, while the petitioner has provided a voting block agreement in support of its assertion that [REDACTED] controls the foreign entity through her claimed minority ownership of the company, the petitioner has not fully documented the ownership of the foreign entity as of the date of filing.

Accordingly, the case will be remanded for a new decision, which shall take proper notice of the adverse findings made herein. The director may issue a notice requesting any additional evidence he deems necessary in order to determine the petitioner's eligibility for the benefit sought, and is instructed to carefully review the ownership of both the petitioner and its claimed foreign affiliate in reaching a determination regarding the qualifying relationship.

ORDER: The decision of the director dated September 18, 2012 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision, which, if adverse, shall be certified to the AAO for review.