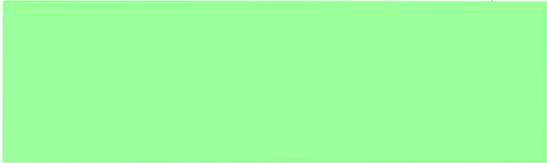


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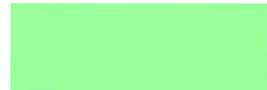
U.S. Citizenship
and Immigration
Services



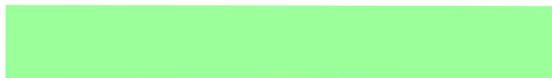
DATE: OFFICE: NEBRASKA SERVICE CENTER

DEC 04 2014

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you

Ron Rosenberg
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 The director's decision will be withdrawn and the matter will be remanded for further consideration.

The petitioner is a commercial real estate management company organized in the State of Louisiana. It seeks to employ the beneficiary as its vice president of finance. 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.

I. Procedural History

The record shows that the Form I-140 was filed on December 12, 2012. The petitioner provided supporting evidence regarding the beneficiary's former and proposed positions with the foreign entity and U.S. petitioner, respectively. The petitioner also provided a pie graph, which shows the foreign entity's share distributions and was accompanied by a share voting agreement, executed on December 22, 1998. The graph shows that [REDACTED] who comprise four of the foreign entity's six shareholders owning 25%, 19.94%, 18.98%, and 23.96%, respectively, agreed to a block voting scheme wherein [REDACTED] would have "absolute final discretion in deciding how the one block of shares [will] be voted."

On June 21, 2013, the director issued a request for evidence (RFE) instructing the petitioner to provide evidence showing that the petitioner and the beneficiary's foreign employer have a qualifying relationship and that the beneficiary was employed abroad and would be employed in the United States in a qualifying capacity.

In response, the petitioner submitted the requested evidence, which included job descriptions, organizational charts, and evidence of the petitioner's and foreign entity's ownership and control. Specifically, with regard to the issue of a qualifying relationship, the petitioner provided a more recently executed share voting agreement, executed on April 16, 2012, containing provisions that were identical to those contained in the 1998 voting agreement, both of which indicate that [REDACTED] has an ownership interest in and effectively controls the foreign entity. The petitioner also provided a copy of its operating agreement, which shows that [REDACTED] owns 80% of the U.S. entity.

Despite the evidence submitted, the director denied the petition on October 8, 2013, concluding that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's former employer abroad. Specifically, the director focused entirely on the respective ownership breakdowns of the two entities, which show that while [REDACTED] owns 80% of the foreign entity, he owns only 25% of the foreign entity, thus indicating that the two entities do not have an affiliate relationship as defined in 8 C.F.R. § 204.5(j)(2). There is no evidence that the director reviewed or considered the share voting agreements that were provided both in support of the original petition and in response to the RFE.

The petitioner filed an appeal with a supporting brief from counsel, who asserts that the director failed to consider the share voting agreement as evidence that the same individual effectively controls both the petitioner and the beneficiary's former employer abroad.

II. The Law

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 or 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.

Additionally, 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;

* * *

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.

III. The Issue on Appeal

As previously indicated, the primary issue to be addressed in the present matter is whether the petitioner has established that it has the requisite qualifying relationship with the beneficiary's former employer abroad.

Based on a comprehensive review of the record, we find that the director's decision was erroneous in that it failed to account for the foreign entity's share voting agreement, which shows that the same person who owns a majority of the petitioner's shares, and therefore controls the U.S. entity, also has effective control of the foreign entity. As the petitioner provided sufficient evidence showing that an affiliate relationship exists between the petitioner and the beneficiary's former employer abroad, the director's decision must be and is hereby withdrawn.

IV. Basis for Remand

Notwithstanding the withdrawal of the director's decision, the record lacks sufficient evidence to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity for one year during the relevant three-year time period prior to filing the instant petition.

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 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. Similar reasoning can be applied to any other employment-based nonimmigrant who can demonstrate that he/she is employed in the United States in a managerial or executive capacity. 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 the present matter, the record shows that the beneficiary was not admitted to the United States as an L-1A nonimmigrant. Rather, he entered the United States as an H-1B nonimmigrant. The record does not establish that the beneficiary's 5-year period of employment with the petitioning entity in the H-1B nonimmigrant visa category has been primarily in a qualifying managerial or executive capacity and therefore may not meet the provisions of section 203(b)(1)(C) of the Act, which requires that the beneficiary's purpose for entering the United States prior to filing the instant petition must have been "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.*" (Emphasis added).

If the petitioner is unable to demonstrate that the beneficiary's purpose for entering the United States meets the above statutory provision, the beneficiary 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 2012 and it is well established that the beneficiary has been present in the United States since 2007, U.S. Citizenship and Immigration Service would be unable to conclude 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 that the beneficiary's employment abroad was in a qualifying capacity.

Accordingly, we hereby remand this matter to the director for the purpose of issuing an RFE with the specific purpose of establishing whether the beneficiary's H-1B employment by the U.S. petitioner has been in a qualifying managerial or executive capacity.

ORDER: The decision of the director dated October 8, 2013 is hereby 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.