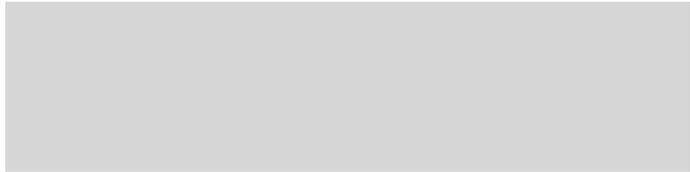




U.S. Citizenship
and Immigration
Services

(b)(6)



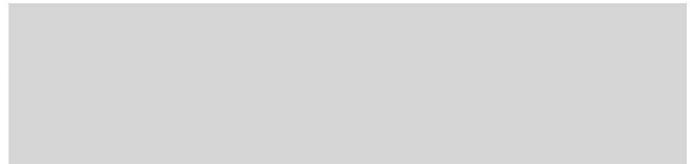
DATE: **JUN 01 2015**

FILE #: [REDACTED]
PETITION #: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The petitioner, a global accounting, tax, and business advisory services provider, filed Form I-140, Immigrant Petition for Alien Worker, to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The Director, Nebraska Service Center, denied the petition and certified his decision to the Administrative Appeals Office (AAO). The director found that the petitioner failed to establish that the beneficiary was employed by a qualifying foreign entity for at least one year in the three years preceding his entry to the United States as a nonimmigrant to work for the petitioner. The director's decision will be affirmed and the petition will be denied.

I. APPLICABLE LAW

Section 203(b)(1) of the Act, in pertinent part, provides for first-preference, employment-based visas for priority workers, including the multinational manager and executives:

(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 regulation at 8 C.F.R. 204.5(j)(3)(i) states, in pertinent part, the following:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in 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;

II. FACTUAL BACKGROUND

The petitioner is a U.S.-based firm that provides business advisory, auditing, accounting and tax services in the United States and in 142 countries worldwide. It seeks to employ the beneficiary in an executive capacity as a Director within its mergers and acquisitions division.

The beneficiary was employed by the petitioner's Indian affiliate in various professional positions from September 1995 until January 2002, and in a managerial capacity from January 2002 until March 2004. He was initially admitted to the United States as an H-1B nonimmigrant on April 24, 2004 and worked for the petitioner as a Senior Associate from May 2004 until December 2006 at which time he left the petitioner's organization to work for an unrelated employer in H-1B status.

In October 2012, five years and ten months after he left the organization, the petitioner re-hired the beneficiary in the position of Director pursuant to an approved H-1B nonimmigrant petition that granted him an amendment and extension of status.¹ The petitioner filed this Form I-140 on March 12, 2013.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary was employed by a qualifying foreign entity for at least one year in a managerial or executive capacity in the three years preceding his entry as a nonimmigrant to work for the petitioner in the position of Director. In determining the beneficiary's eligibility pursuant to section 203(b)(1)(C) of the Act and 8 C.F.R. § 204.5(j)(3)(i)(B), the director concluded that U.S. Citizenship and Immigration Services (USCIS) must look at the three-year period preceding his current period of H-1B employment that commenced in October 2012, rather than the three-year period preceding his initial admission to the United States to work for the petitioner in 2004. The director concluded that a broader interpretation of the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) under the circumstances presented by this petition would be "in direct contradiction with the intent of this classification."

The director certified the decision to this office requesting clarification on whether the three-year period preceding the beneficiary's initial admission to work for the petitioner in April 2004, or the three-year period preceding his subsequent amendment of status to work for the petitioner in October 2012, should be the reference point for purposes of determining whether he had the required one year of qualifying employment abroad.

In a brief submitted on certification, the petitioner asserts that the plain language of 8 C.F.R. § 204.5(j)(3)(i)(B) should be broadly interpreted such that USCIS can determine eligibility by looking at the three year period of employment prior to the beneficiary's initial admission to the United States to work for the petitioner as a nonimmigrant on April 24, 2004. The petitioner emphasizes that the beneficiary has resided continuously in the United States since his initial admission as an H-1B nonimmigrant and currently works as an executive in valid nonimmigrant status for an affiliate of his last foreign employer.

¹ The beneficiary maintained H-1B nonimmigrant status and worked for the unrelated U.S. employer between December 2006 and October 2012 and had been in the United States in H-1B status for nearly nine years at the time this petition was filed. Generally, a beneficiary may be admitted to the United States in H-1B status for a maximum period of six years. See section 214(g)(4) of the Act. However, the record reflects that the beneficiary met the requirements for an exemption to the six-year limitation on H-1B status pursuant to Section 106(a) of the "American Competitiveness in the Twenty-First Century Act" (AC21) as amended by the "Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ21).

In support of its claim that the regulation should be interpreted broadly, the petitioner references the commentary to the Department of Justice's Proposed Rule for "Employment-Based Immigrants," 60 Fed. Reg. 29771, 29775-76 (June 6, 1995). The petitioner asserts that this rulemaking suggests that a "broader interpretation of the regulations was intended, stating that '[t]he fact that the alien is working in the United States should not preclude him or her from qualifying as a priority worker.'" The petitioner also asserted that the commentary clearly indicates that intervening employment with a different employer should not disqualify the beneficiary, as it states "[a]liens who have worked for an unrelated employer should be treated the same as aliens who are outside the United States for purposes of eligibility." In this case, weighing in favor of approval, the petitioner notes that the beneficiary is currently working for the petitioning entity and not an unrelated employer.

III. ANALYSIS

The clear language of the statute indicates that the relevant three-year period to be used as a reference point in determining whether the beneficiary had one year of managerial or executive employment abroad is "preceding the time of the alien's application for classification and admission into the United States under this subparagraph." Section 203(b)(1)(C) of the Act.

The statute, however, is silent with regard to those 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 former Immigration and Naturalization Service (INS) concluded that it was not the intent of Congress to exclude employees who had already been transferred to the United States to work within the same corporate group from utilizing this employment-based immigrant classification. Specifically, the former 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).

While the commentary to the proposed rule specifically mentions "nonimmigrant managers or executives," a phrase that can reasonably be interpreted as those beneficiaries admitted as L-1A intracompany transferees under section 101(a)(15)(L) of the Act, the plain language of the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) is broader.² The regulation indicates that if the beneficiary is "working for" an entity that has the requisite

² All federal agencies engaged in rule making must incorporate in the rules adopted "a concise general statement of their basis and purpose." 5 U.S.C. § 553(c). Federal courts have given deference to an agency's own justification for its regulations as a source of guidance in regulatory interpretation. *See, e.g., Talk*

relationship with the beneficiary's foreign employer, USCIS will look to the three years preceding his or her admission to the United States to determine whether he or she had the requisite one year of employment abroad. Therefore, a beneficiary will not be precluded from classification as a multinational manager or executive if he or she was admitted to the United States to work for the petitioner (or its subsidiary or affiliate) in a different non-immigrant classification, such as H-1B or E status, or in a position that is not managerial or executive in nature.³

The regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) allows USCIS to look beyond the three-year period immediately preceding the filing of the I-140 petition when the beneficiary is already employed by a qualifying U.S. entity. Without such a provision, a beneficiary who had been employed by a qualifying U.S. organization in a nonimmigrant status for more than two years would otherwise be ineligible for classification as a multinational manager or executive.

The beneficiary in this matter was admitted to work for the petitioner in H-1B status and then left the petitioning organization for nearly six years to work for an unrelated U.S. employer before returning to work for the petitioner. Therefore, the circumstances of this case, are not precisely those contemplated by the INS in promulgating the regulation at 8 C.F.R. § 204.5(j)(3)(1)(B), which assumes continuing employment within the same organization following the beneficiary's admission.

In order to determine the appropriate point of reference given the facts presented here, it is necessary to determine the impact of the beneficiary's intervening five years and ten months of employment with an unrelated organization.

America, Inc. v. Michigan Bell Tel. Co., 131 S. Ct. 2254, 2260-65 (2011)(relying on statement of basis and purpose to construe regulation); *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999 (finding that “[a]lthough the preamble does not 'control' the meaning of the regulation, it may serve as a source of evidence concerning contemporaneous agency intent.”)). However, the courts have found that such statements of basis and purpose do not provide useful guidance, where, as here, the statement is contrary to the plain language of the regulation. *See, e.g., Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 532 (2009)(concluding that a passage in the agency's statement of basis and purpose “cannot be reconciled with the regulation”).

³ This interpretation is consistent with regulations governing prospective L-1 nonimmigrant intracompany transferees who spend time in the United States after acquiring one year of qualifying employment with a foreign entity. For those beneficiaries, periods spent in the United States in lawful status for a branch, parent, affiliate, or subsidiary of their foreign employer are not interruptive of the beneficiary's qualifying year of foreign employment. *See* 8 C.F.R. 214.2(l)(1)(ii)(A). In promulgating the regulations on 203(b)(1)(C) of the Act, the former INS commented that “this regulation reflects the statute and follows criteria long in place for the adjudication of petitions for nonimmigrant intra-company transferees” 56 Fed. Reg. 30703, 30705 (July 5, 1991).

The principal focus of section 203(b)(1)(C) of the Act and of both 8 C.F.R. §§ 204.5(j)(3)(1)(A) and 204.5(j)(3)(1)(B) is on the continuity of the beneficiary's employment with the same multinational organization in the United States. The legislative history noted "the need of multinational business to transfer key personnel around the world as nonimmigrants is paralleled in this category to allow a basis upon which these individuals may immigrate." See H.R. Rep. No. 101-723 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6710, 6739, 1990 WL 200418 (Leg. Hist.). The three-year window established by the statute ensures that there will be no significant interruptions in employment within the same organization and is consistent with the purpose of this immigrant classification. Allowing the "transfer" of employees who had worked outside of the organization for several years would be contrary to Congress's intent that multinational businesses will use this immigrant classification solely to permanently transfer their foreign managerial and executive employees to their United States operations.

Under the statute and 8 C.F.R. § 204.5(j)(3)(1)(A), an interruption in employment within a petitioner's multinational organization in excess of two years during the three years preceding the filing of an immigrant visa petition would clearly render a beneficiary who is outside the United States ineligible for classification as a multinational manager or executive. Such a beneficiary, even if he had previously worked for a foreign qualifying entity for many years, would not be able to establish one year of qualifying employment in the three years preceding the filing of the petition. As such, a beneficiary would require an additional full year of qualifying employment abroad before a U.S. petitioner could file a multinational manager or executive petition on his behalf.

Applying this same logic to a beneficiary who has already been admitted to the United States, a beneficiary who worked as a manager or executive for a qualifying foreign organization for one year or longer, but who left employment with that multinational organization for a period of two years or longer *after* being admitted to the United States as a nonimmigrant, must also be precluded from classification as a multinational manager or executive. Such a beneficiary would also require an additional year of qualifying employment abroad before a U.S. petitioner could file a petition on his behalf under section 203(b)(1)(C) of the Act.

It is consistent with the purpose of this classification to treat any two-year break in employment within the petitioner's multinational organization as interruptive of a beneficiary's continuous employment and as a potential basis for ineligibility for this classification, whether it occurred in the three years prior to his admission as a nonimmigrant or after a beneficiary's entry to the United States.

The petitioner suggests that the plain language of the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) nevertheless allows for a significant interruption in employment with the petitioner's multinational organization, so long as the beneficiary: (1) was employed by a qualifying foreign entity in a managerial or executive capacity for at least one year prior to his initial admission to the United States; (2) was initially admitted to the United States to work for the petitioner or its affiliate or subsidiary; and (3) is currently working for the petitioner as a nonimmigrant at the time the petitioner files the immigrant multinational managerial or executive petition.

We agree with the director's determination that such a broad interpretation of 8 C.F.R. § 204.5(j)(3)(i)(B) is in direct contradiction with the intent of this classification and could result in approvals of visa petitions for statutorily ineligible beneficiaries. Statutes and regulations must be read as a whole, and interpretations

should be consistent with the plain purpose of the Act to avoid absurd results. *See generally Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). The petitioner's interpretation could lead to absurd and unintended results. *Id.* at 388.

Under the petitioner's interpretation of 8 C.F.R. § 204.5(j)(3)(i)(B), any beneficiary who had worked as a manager or executive for a qualifying foreign entity for one year would remain eligible for classification as an immigrant multinational manager or executive indefinitely as long as he or she was initially admitted to work for the U.S. petitioner (or its affiliate or subsidiary) and eventually returned to the same organization prior to filing the Form I-140.

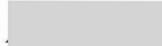
In support of its claim that the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) should be interpreted broadly, the petitioner references the commentary to the former INS's 1995 Proposed Rule for Employment-based Immigrants, 60 Fed. Reg. 29771-01, 1995 WL 330945 (June 6, 1995).⁴ In discussing a proposed amendment to the regulations at 8 C.F.R. 204.5(j)(3), the agency noted that "Section 204.5(j)(3) of the regulations inadvertently omitted situations where the alien was in lawful nonimmigrant status while working for an unrelated employer but worked for a qualifying company abroad in a managerial or executive position during at least 1 of the 3 years preceding the filing of the petition." The petitioner emphasizes that the commentary to the proposed rule states that "the fact that the alien is working in the United States should not preclude him or her from qualifying as a priority worker," and that "[a]liens who have worked for an unrelated employer should be treated the same as aliens who are outside the United States for purposes of eligibility." 60 Fed. Reg. 29771, 29776.

The petitioner contends that this language clearly indicates that "intervening employment with a different employer should not disqualify the beneficiary from this visa classification," and emphasizes that, regardless, the beneficiary currently works for the petitioner and not for an unrelated employer.

We agree that intervening employment with a different employer would not automatically disqualify a beneficiary. However, any break in employment that exceed two years will interrupt the beneficiary's continuity of employment with the petitioner's multinational organization⁵. Here, the beneficiary worked for an unrelated employer for more than five years. Although he resumed employment with the petitioner after that interruption, he can no longer establish eligibility based on the three-year period of employment that immediately preceded his initial admission to the United States in 2004. As a result, the appropriate reference point is the date on which the beneficiary commenced his current period of executive employment with the petitioning company in October 2012. As the beneficiary was not employed by a qualifying foreign entity between October 2009 and October 2012, the petitioner cannot establish his eligibility as a multinational manager or executive. Accordingly, the director's decision will be affirmed and the petition will be denied.

⁴ This proposed amendment was never published in the *Code of Federal Regulations* and is therefore not binding on USCIS. *See Am. Iron & Steel Inst. v. EPA*, 886 F.2d 390, 400 (D.C.Cir.1989) ("One logical outgrowth of a proposal is surely...to refrain from taking the proposed step.").

⁵ Such breaks in employment may include, but are not limited to, intervening employment with a different U.S. employer or periods of stay in a nonimmigrant status without work authorization.



IV. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. *See* section 291 of the Act, 8 U.S.C. § 1361 (2012); *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, the petitioner has not sustained that burden.

ORDER: The director's decision dated August 27, 2014 is affirmed. The petition is denied.