U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF BTC-M-, LLC

DATE: MAY 3, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an investment banking firm, seeks to permanently employ the Beneficiary as its chief executive officer (CEO)/head of global markets under the multinational executive or manager immigrant classification. *See* Immigration and Nationality Act (the Act) § 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director, Texas Service Center, denied the petition. The Director concluded that the evidence of record did not establish: (1) that the Petitioner had been doing business as defined in the regulations for at least one year at the time the petition was filed; and (2) that the Beneficiary's foreign employer continues to do business.

The matter is now before us on appeal. In its appeal, the Petitioner emphasizes that it previously provided evidence that it performs business development activities in the United States for other members of its multinational group pursuant to an agreement with an affiliate in Panama. The Petitioner asserts that it is not required to provide evidence that it transacts business directly with unaffiliated third parties. The Petitioner also provides a list of the documents previously submitted to establish that the foreign entity is doing business, and asserts that the evidence was sufficient to meet its burden of proof.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

A United States employer may file Form I-140 to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager.

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.

Additionally, the regulations at 8 C.F.R. § 204.5(j)(3)(i) state that the petitioner must provide the following evidence in support of the petition in order to establish eligibility:

(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 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;

(C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and

(D) The prospective United States employer has been doing business for at least one year.

The regulation at 8 C.F.R. § 204.5(j)(2) defines the term "doing business" as the regular, systematic and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

II. DOING BUSINESS IN THE UNITED STATES

The first issue to be addressed is whether the Petitioner established that it had been doing business in the United States for at least one year at the time it filed the Form I-140.

A. Evidence of Record

The Petitioner filed the Form I-140 on August 19, 2013. The Petitioner stated on the Form I-140 that it is an investment banking firm established in with ten U.S. employees, $1,078,334 in gross annual income, and net annual income of $219,647.

At the time of filing, the Petitioner submitted a copy of its lease agreement, evidence of rent payments, and copies of business tax receipts and business licenses. The Petitioner also provided copies of seven IRS Forms W-2, Wage and Tax Statement, issued in 2011, and nine Forms W-2 issued in 2012.

The Petitioner submitted a copy of its IRS Form 1120, U.S. Corporation Income Tax Return, for 2012. The tax return shows that the Petitioner had $0 in assets, $0 in gross receipts or sales, $0 in total income, and -$1,485,945 in taxable income after rent, salaries and wages, taxes and licenses, and other deductions were taken. Finally, the Petitioner submitted an "Independent Accountants' Report on Forecasted Financial Statements," which included a "forecasted balance sheet and the accompanying forecasted statement of income and expenses" of the Petitioner for the six-month period ending June 30, 2013. These forecasted financial statements showed year-to-date revenues derived from "Sale Service" in the amount of $1,078,333.62.

The Director issued a request for evidence (RFE) on February 9, 2014. The Director acknowledged the initial evidence and advised the Petitioner that it was not sufficient to show that the company had been doing business for the previous year. The Director requested additional evidence such as receipts, invoices, contracts, agreements, and detailed reports to show that the Petitioner was engaged in the provision of goods and/or services.

The Petitioner's response included: additional evidence related to its lease agreements and payment of rent; IRS Forms 941, Employer's Quarterly Federal Tax Return, for 2011 and 2012; its 2013 IRS Form 1120 showing $1,878,024 in gross receipts or sales; evidence that it maintains workers' compensation insurance and health insurance for its employees; monthly bank statements for the period 2010 through 2014; and, payroll summaries for the period 2010 through 2013.

The Petitioner also provided a copy of a "Cost Plus Agreement" between the Petitioner and an affiliate of the Petitioner established in Panama. The agreement indicates that may provide certain services including but not limited to support services related to support and maintenance for the Petitioner's daily operation. The agreement further provides that the Petitioner "will provide certain services to such as provide them commercial representation among others." Article 3 of the Agreement states that the Petitioner "will commercially promote and represent in the United States of America," and Article 4 states that will provide the following benefits:

a) Payroll benefits (National Insurance) and legal benefits or contractual agreement with each employee.

b) Expenditure on training courses.
c) Costs of membership in associations or attendance at lectures or presentations.
d) Travel expenses, travel and other related expenses. . .
e) Other expenses.
f) Marketing and promotion expenses.
g) Office rent.
h) Services related to the rental of office: secretarial, office, conference room rental, etc.
i) Communications services: landline phones, cell phones, internet access, or or any similar service.
j) Licenses: programs, operational or other.
k) Advisories: accounting, compliance, tax, legal, including "company secretarial services," handling payroll.
l) Materials and equipment.
m) Interest expense and bank fees.
n) External audit.
o) Any other expenses necessary for the operation of the office and to fulfill the purpose of promoting in USA.

Article 8: Compensation states, in part, that shall pay to [the Petitioner] its operating costs and expenses plus an additional 10% of such amount, for representation services of by [the Petitioner] in USA, that will be invoiced by [the Petitioner] monthly and on final completion of the Services ordered . . ." The Cost Plus Agreement was signed by both parties in January 2013. However, Article 11 of the agreement defines the term as "one (1) year commencing on 1st July 2012," with a requirement that any extensions be agreed in writing.

The Petitioner provided copies of 22 invoices it issued to between January and December 2013 for "Business Representation fees amount and other services." The total amount billed for these services in 2013 was $1,878,033, the same figure reported as gross receipts or sales on the Petitioner's 2013 tax returns. The invoices are not detailed but they each include a reference to "Payroll, tax, rent, insurance, business and allowances, accounting, etc."

The Petitioner's bank statements reflect that the Petitioner received wire transfers from throughout 2013. The Petitioner's 2011 and 2012 bank statements show regular transfers of funds as "working capital" from In 2013, the wire transfers corresponding to the Petitioner's first three months' of invoices were also designated as "working capital." The bank statements reflect that very few other deposits were made to the Petitioner's account.

The Director denied the petition on October 2, 2014, concluding that the evidence of record did not establish that the Petitioner had been doing business for at least one year as of the date of filing. In denying the Petition, the Director stated:

> This evidence is insufficient in establishing that the Petitioner has been doing business, since these were not accompanied by service contracts which would enable USCIS to conclude that the petition has engaged in business transactions that involved the provision of goods and/or services. USCIS also notes that neither the petitioner's payment of health insurance nor its payment of the employees' wages is indicative of business transactions between the petitioner and a third party. In order to establish that the US branch office is doing business the petitioner must provide evidence of actual business transactions and establish that such transactions have occurred and continue to occur on a "regular, systematic and continuous" basis. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).

On appeal, the Petitioner addresses its Cost Plus agreement with [redacted] further explaining the agreement as follows:

> Pursuant to the Cost Plus Agreement . . . [the Petitioner] in [redacted] is involved in expanding the [redacted] groups' business through business development activities such as marketing and offered consultancy services to clients. These services are invoiced to [redacted] which ultimately pays [the Petitioner] through wire monthly wire [*sic*] transfers. We are providing copies of invoices from [the Petitioner] to [redacted] and wire transfers from November 2013 through October 2014 which documents [*sic*] these transactions.

The Petitioner further explained that its "business development activities revolve around providing a referral base for its operations in the UK, Venezuela and Panama. Its business development activities benefitting these entities are compensated through its Cost-Plus Agreement with [redacted] The Petitioner states that, for the sake of efficiency, it has provided invoices specifically for Panama and the [redacted] office."

The Petitioner asserts that it does not have to establish that it provides goods and/or services to an unaffiliated third party and cites an unpublished AAO decision which has since been withdrawn and published as *Matter of Leacheng*, 26 I&N Dec. 532 (AAO 1015). The Petitioner asserts that, like the petitioner in *Matter of Leacheng,* it provided a copy of its service agreement with an affiliate showing that it provides market research and business development services to related entities in exchange for a service fee that covers labor and other expenses. The Petitioner states that its evidence is sufficient to establish that it is engaged in the regular, systematic and continuous provision of services.

Finally, the Petitioner asserts that the Director improperly cited to *Matter of Soffici*, 22 I&N Dec. 158 (Comm'r 1998), which the Petitioner characterizes as a "completely unrelated case."

B. Analysis

Upon review, and the reasons discussed herein, the evidence of record does not establish that the Petitioner had been doing business in the United States for at least one year prior to filing the I-140 on August 19, 2013.

In order to meet the requirements for this visa classification, the Petitioner must submit evidence that it has been doing business since August 2012. The Petitioner relies on its Cost Plus Agreement with its foreign affiliate, along with evidence of invoices and receipt of payments stemming from that agreement, as evidence that it is doing business. However, it has not submitted evidence that it had a Cost Plus Agreement or similar arrangement in place prior to January 2013. Although the agreement signed in January 2013 states that it took effect in July 2012, the Petitioner reported on its IRS Form 1120 that it had $0 in assets and $0 in income in 2012. It did not start reporting monies received from as sales income until 2013. The Petitioner did have substantial payroll and rent expenses in 2012, but payment of such expenses does not serve as evidence that the company was actively engaged in the regular, systematic, and continuous provision of goods or services. Therefore, even if we accepted the Cost Plus Agreement, invoices, and wire transfers as sufficient to show that the Petitioner had been doing business, the evidence could not establish that it has been doing business for a full year prior to filing the petition.

We will now turn to the Petitioner's claim that its Cost Plus Agreement, 2013 invoices to and 2013 bank statements are sufficient to establish that it has been engaged in the regular, systematic and continuous provision of services. We agree with the Petitioner that *Matter of Leacheng* specifically clarifies that provision of services to other companies in the same qualifying organization constitutes "doing business" as defined in the regulations.

However, the petitioner in *Matter of Leacheng* did not merely submit a copy of a contract with a related company, copies of invoices, and evidence that it received payment for the invoices. Rather, the petitioner in that matter provided those documents in addition to "extensive evidence of its correspondence with customers and other evidence of its performance of the services outlined in the service agreement" as well as "copies of commercial sales invoices issued by the Hong Kong affiliate to United States customers and copies of bills of lading as evidence of the import and sales activities." *Matter of Leacheng*, I & N Dec. at 533-34.

The Petitioner states on appeal that its "business development activities revolve around providing a referral base" for other companies outside the United States. We note that the Petitioner specifically referred to its target market as American business, corporations, individuals and governments, yet there is no direct evidence in the record to establish that the Petitioner is, or has been, actively engaged with any of these type of clients. Unlike the petitioner in *Matter of Leacheng*, the Petitioner in this matter has neither defined the specific services it provides nor submitted documentation to corroborate that it is carrying out the broadly described "referral" or "business development" services it claims to provide to its related foreign entities. The Petitioner does not have to be a party to contracts with unaffiliated entities, but it is reasonable to expect it to provide some evidence of the

types of activities in which it engages in the U.S. market. However, the Petitioner offers only the contract, invoices and evidence of payment of invoice, as well as documentation of rent, insurance, utility and salary payments. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

We acknowledge the Petitioner's assertion on appeal that the Director erred in relying upon *Matter of Soffici*, a case that the Petitioner asserts to be factually irrelevant. We find that the Director relied upon *Soffici* based on the Court's decision in that case regarding the burden of proof and evidentiary requirements, as *Matter of Soffici* cites another precedent case supporting a conclusion that a petitioner must submit sufficient supporting evidence to corroborate its assertions on the record, namely *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972). While both of these precedent decisions involved different visa classifications, the burden of proof is always on the petitioner in visa petition proceedings. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The applicable "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.*

For the reasons discussed herein, the evidence of record does not establish that the Petitioner has been doing business for at least one year prior to filing the petition on August 19, 2013. Accordingly, the appeal will be dismissed.

III. DOING BUSINESS ABROAD

The remaining issue addressed by the Director is whether the Petitioner established that the Beneficiary's foreign employer continues to do business.

The regulation at 8 C.F.R. § 204.5(j)(2) states that "*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."

A. Evidence of Record

The Petitioner states that it is wholly-owned by , a company established in the Netherlands. The Petitioner further states that the Beneficiary's qualifying foreign employment was with a company established in Venezuela, which was a wholly-owned subsidiary of The Petitioner explained that the Venezuelan company was re-domiciled to Barbados, is now known as and is also a wholly-owned subsidiary of

The Petitioner submitted: incorporation documents for minutes of a shareholders' meeting of , in which the decision was approved to re-domicile in Barbados; incorporation documents, stock certificates, by-laws and other corporate documentation for the Barbados entity established in ; the Venezuelan entity's lease agreement signed on April 11, 2011; and 2012 financial statements and Barbados tax returns for

In the RFE, the Director acknowledged the Petitioner's submission of financial statements and a tax return, but requested additional "evidence to establish that the foreign organization is still doing business." The Director advised that such evidence may include receipts, invoices or detailed reports showing that the foreign organization traded or exchanged goods or services, or copies of the foreign entities licenses or contracts and agreements with shipping and receiving companies.

In response, the Petitioner submitted evidence related to the Venezuelan entity, which was listed on a "Global Corporate Governance" chart as a branch of (Barbados). This evidence included: (1) a 2012-13 Venezuelan tax return which identified the company name as (2) an internally prepared payroll summary for Venezuelan employees on letterhead; (3) evidence of health insurance payments for employees of in 2013 and 2014; (4) evidence of rent payments made by in 2013; (5) invoices issued to for Internet and telephone service in 2013; and (5) bank statements and evidence of rent payments made by

In denying the petition, the Director acknowledged receipt of the above-referenced documentation, but concluded that "the provided documentation is not sufficient evidence that the foreign company is doing business, since these were not accompanied by service contracts which would enable USCIS to conclude that the company has engaged in business transactions that involved the provision of goods and/or services." The Director emphasized that the Petitioner did not respond to his request for evidence of "actual business transactions."

On appeal, the Petitioner asserts that "the financial documents, and employee benefits paid to employees by the office in Venezuela" clearly establishes that the company is doing business and not merely a shell business with an office presence.

B. Analysis

Upon review, the Petitioner has not established that the Beneficiary's foreign employer continues to do business abroad.

The Director specifically requested evidence of business transactions, such as receipts, invoices or detailed reports showing that the foreign entity is actively engaged in trading or exchanging goods and services. The Director denied the petition after determining that the submitted documentation

did not satisfy that request. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On appeal, the Petitioner had the opportunity to submit additional evidence of the type requested in the RFE, but instead chooses to rely on the documentation previously submitted, despite the Director's determination that such evidence was insufficient to establish that the foreign entity is doing business.

It is reasonable to request that a company that claims to be doing business as defined in the regulations to submit evidence of individual business transactions, rather than limiting its submissions to evidence of rent, salary, insurance and utility payments. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

As the Petitioner has not provided any additional evidence or explanation in support of the appeal, we will not disturb the Director's determination and the appeal will be dismissed.

IV. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of BTC-M-, LLC*, ID# 12417 (AAO May 3, 2016)