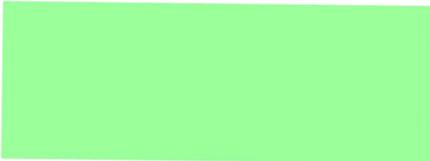


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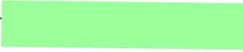


U.S. Citizenship
and Immigration
Services



DATE: JAN 08 2015

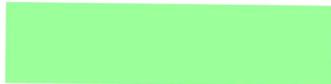
Office: CALIFORNIA SERVICE CENTER

FILE: 

IN RE:

Petitioner:

Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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,

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

Ron Rosenberg

Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa and the Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The matter is now before us on a combined motion to reopen and reconsider. We will grant the motion and affirm our previous decision.

The petitioner filed a Form I-129 Petition for a Nonimmigrant Worker seeking to qualify the beneficiary as an L-1B nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a California corporation, is engaged in the packaging business. The petitioner states that it is an affiliate of the beneficiary's foreign employer located in China. The petitioner seeks to employ the beneficiary as a "stretch blow/blow film/bag seal & cut/recycle machine specialist" for a period of three years.

The director denied the petition, concluding that the petitioner did not establish that the beneficiary was employed abroad in a capacity requiring specialized knowledge or that he would be employed in the United States in a specialized knowledge capacity. Further, the director found that the petitioner had not demonstrated that it has a qualifying relationship with the beneficiary's foreign employer.

The petitioner subsequently filed an appeal. We dismissed the petitioner's appeal finding that the petitioner had not overcome either basis for denial of the petition. The matter is now before us again on a combined motion to reopen and reconsider. The petitioner submits additional evidence in support of its claim that it has a qualifying relationship with the foreign entity and asserts that this office's decision imposed evidentiary requirements on the petitioner which are not set forth in the statute or regulations.

I. THE LAW

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129, Petition for a Nonimmigrant Worker (Form I-129) shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

II. QUALIFYING RELATIONSHIP

The first issue to be addressed is whether the petitioner established that it has a qualifying relationship with the foreign entity. 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. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The petitioner claims to have an affiliate relationship with [REDACTED] based upon [REDACTED] 100% ownership of both entities. In dismissing the petitioner's appeal, we pointed to discrepancies on the record indicating that the foreign entity is owned by [REDACTED] a U.S. company, and not by Mr. [REDACTED] as claimed. In this regard, we emphasized that the petitioner submitted a Chinese Corporation Business License dated June 23, 2010 and the foreign entity's articles of incorporation dated January [REDACTED] both of which indicated that the sole "shareholder (founder)" and "investor" in [REDACTED] was [REDACTED]

We acknowledged the petitioner's submission of a "Grant Deed" dated May 18, 2007 in response to the director's request for evidence (RFE). The Grant Deed indicated that acting chairman of [REDACTED] transferred 100% of his shareholding in [REDACTED] to Mr. [REDACTED] on that date. However, we found insufficient evidence that Mr. [REDACTED] had the authority to effectuate this transfer and found that the evidence did not overcome evidence in the record indicating that [REDACTED] and not Mr. [REDACTED] actually owns the foreign entity. In this regard, we observed that the petitioner had not articulated whether Mr. [REDACTED] paid any consideration in exchange for his purported ownership. We concluded that the petitioner had not demonstrated that ownership in the foreign entity, pursuant to Chinese law, had been transferred to Mr. [REDACTED] pursuant to the asserted "grant deed" transaction.

On motion, the petitioner submits additional evidence in support of its claim that Mr. [REDACTED] is the sole owner of the foreign entity. The petitioner provides an "Equity Transfer Agreement of [REDACTED] [REDACTED] not previously submitted on the record. The agreement states that [REDACTED] agreed to transfer "100% equity" in the foreign entity to Mr. [REDACTED] for 705,000 Chinese Yuan. The agreement bears a signature from Mr. [REDACTED] dated November 29, 2006 and a signature from Mr. [REDACTED] dated June 16, 2014. The agreement includes

two attachments detailing the transfer of blowing, filming, cutting, and other machines. Further, the petitioner provides a statement from Mr. [REDACTED] dated July 14, 2014 in which he indicates that [REDACTED] is the "founding and sole shareholder" of the foreign entity. Mr. [REDACTED] explains that he is the sole shareholder of [REDACTED]. Mr. [REDACTED] also states the following:

- IV. Since I am the sole shareholder of [REDACTED] and [REDACTED] [REDACTED] is the sole shareholder of [REDACTED] [REDACTED], I, prior to May 18, 2007 exercised ownership and control over [REDACTED] via my own ownership and control of [REDACTED]
- V. On May 18, 2007, I sold the interest I held in [REDACTED] through my ownership in [REDACTED] to [REDACTED]

Mr. [REDACTED] further states that he is not in possession of any other evidence of his former ownership in [REDACTED] [REDACTED] as this documentation "has been discarded due to the passage of time." Otherwise, the petitioner submits the same evidence relevant to ownership in the foreign entity discussed in our previous decision.

Upon consideration of this additional evidence, we will affirm our previous decision that the petitioner has not established that it has a qualifying relationship with the foreign entity.

The evidence submitted on motion fails to establish that the foreign entity was owned by Mr. [REDACTED] sole owner of the petitioner, as of the date of the filing of the petition. As noted above, the agreement was countersigned by Mr. [REDACTED] the claimed former owner of the foreign entity, on June 14, 2014, more than one year after the filing of the petition. First, it is questionable that the petitioner did not submit the equity transfer agreement previously on the record. Further, given the date the agreement was countersigned, it is insufficient to establish that the foreign entity was owned by Mr. [REDACTED] as of the date of the filing of the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). 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).

The petitioner has not submitted sufficient supporting documentation of the claimed transference of foreign entity ownership to overcome the aforementioned ambiguity in the grant deed agreement. For instance, the petitioner could have submitted stock or membership certificates, a stock or membership ledger, minutes of relevant foreign entity meetings, documentation of monies, property, or other consideration furnished in exchange for ownership, or other such relevant documentation to support the grant deed transaction. Mr. [REDACTED] assertion that documentation of his former ownership in the foreign entity has been "discarded due to

the passage of time" is not credible or plausible, given the size of this transaction, and does not explain the absence of documentation indicating that Mr. [REDACTED] is the current owner of the foreign entity. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). If a required document does not exist or cannot be obtained, the petitioner must demonstrate this and submit secondary evidence pertinent to the facts at issue. *Id.* The statement must indicate the reason the record does not exist and indicate whether similar records for the time and place are available. 8 C.F.R. § 103.2(b)(2)(ii).

Here, without supporting evidence to substantiate the equity transfer agreement or grant deed transaction transferring ownership to Mr. [REDACTED], Mr. [REDACTED] assertions are not sufficient to support that this transaction took place, particularly given the contradictory evidence submitted on the record. As noted in our previous decision, the petitioner has not sufficiently supported the grant deed transaction with other evidence, up to and including evidence that consideration was paid by Mr. [REDACTED] for ownership in the foreign entity. 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)).

Further, the assertions of the petitioner on motion leave further question as to the actual ownership in the foreign entity. Mr. [REDACTED] states on motion that he was formerly the sole shareholder of [REDACTED] which in turn, wholly owned the foreign entity. However, the grant deed submitted on motion reflects that Mr. [REDACTED] was the sole owner of [REDACTED] and [REDACTED] claimed ownership in the foreign entity is not referenced. Again, 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. at 591-92.

Therefore, the evidence submitted on motion does not establish that the foreign entity is wholly owned by Mr. [REDACTED] as necessary to demonstrate that it had an affiliate relationship with the petitioner at the time of filing. As such, we will affirm our previous determination that the petitioner has not established that it has a qualifying relationship with the foreign entity.

III. SPECIALIZED KNOWLEDGE

The second issue to be addressed is whether the petitioner established that the beneficiary possesses specialized knowledge and whether he has been employed abroad and would be employed in the United States in a specialized knowledge capacity.

Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), provides the statutory definition of specialized knowledge:

For purposes of section 101(a)(15)(L), an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge

of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

Furthermore, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D) defines specialized knowledge as:

[S]pecial knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

In dismissing the appeal, we emphasized that the petitioner had submitted minimal evidence comparing the beneficiary to similarly employed workers in the petitioning organization or in the petitioner's industry as necessary to demonstrate that his knowledge is special or advanced. Further, we concluded that the petitioner had not supported its assertions that the machines operated by the beneficiary are uncommon in the petitioner's industry. In addition, we acknowledged the petitioner's claim that the beneficiary would train his fellow machine specialists in the United States, but noted that the petitioner failed to articulate this responsibility in the beneficiary's duties.

On motion, the petitioner contends that our finding regarding the beneficiary's asserted specialized knowledge is erroneous "because it imposes evidentiary requirements on the Petitioner which are not imposed by law." The petitioner asserts that the regulations do not require that a beneficiary's specialized knowledge be established by "extrinsic evidence" and may consist of letters from the petitioner or the qualifying foreign entity. The petitioner submits two previous decisions of this office and contends that these indicate that specialized knowledge can be established by a beneficiary's "uncommonly long tenure with the petitioner and its affiliates – just like the beneficiary in this case."

As noted in our previous decision, it is the weight and type of evidence which establishes whether or not the beneficiary actually possesses specialized knowledge. USCIS cannot make a factual determination regarding the beneficiary's specialized knowledge if the petitioner does not, at a minimum, articulate with specificity the nature of the claimed specialized knowledge, describe how such knowledge is typically gained within the organization, and explain how and when the beneficiary gained such knowledge. As both "special" and "advanced" are relative terms, determining whether a given beneficiary's knowledge is "special" or "advanced" inherently requires a comparison of the beneficiary's knowledge to that of others in the petitioning company and/or a comparison to that of others holding comparable positions in the petitioner's industry. The ultimate question is whether the petitioner has met its burden of demonstrating by a preponderance of the evidence that the beneficiary's knowledge or expertise is advanced or special, and that the beneficiary's position requires such knowledge.

However, the petitioner failed to provide evidence comparing the beneficiary against his similarly-employed colleagues or those similarly placed in the industry to demonstrate that his knowledge is uncommon or distinguished. As noted in our previous decision, the petitioner provided evidence indicating that the beneficiary was one of twenty-nine similarly placed workers with the foreign entity and the petitioner failed

to articulate or support its claim that the beneficiary possesses advanced knowledge of company processes compared to these similarly placed colleagues. Likewise, the petitioner provided no evidence to substantiate its assertion that its machinery is special or advanced when compared to comparable machinery operated by other companies in the same industry, and thus did not support a determination that the knowledge required for the position is specialized. It is not sufficient to merely state that a beneficiary is the most experienced or that the company's machinery is uncommonly complex or fast without substantiating these assertion with objective and independent evidence. In making such a determination, it is appropriate for USCIS to consider corroborating evidence to substantiate the assertions of the petitioner. Once again, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The petitioner fails to address any of the evidentiary shortcomings addressed in our previous decision, including a discrepancy in the beneficiary's duties, which indicates that he will spend all of his times operating the petitioner's equipment rather than training other specialists as claimed. Once again, 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).

In addition, the petitioner makes reference to two unpublished decisions of this office and asserts that these establish that a beneficiary's specialized knowledge can be established based solely on the assertions made by the petitioner and foreign entity in support letters. The petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

However, we do not dispute that it is possible that a petitioner may establish that a beneficiary holds specialized knowledge based solely on letters submitted by the petitioner and/or the foreign employer. The "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.* Thus, in adjudicating a petition pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

In the present matter, the petitioner was asked by the director to provide explanations and evidence distinguishing the beneficiary from his similarly placed colleagues in the company and in the industry at large. The regulation at 8 C.F.R. § 214.2(l)(3)(viii) explicitly provides that a petition shall be accompanied by "such other evidence as the director, in his or her discretion, may deem necessary." 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). Again, it is not sufficient to generally state that a beneficiary is the most experienced and knowledgeable, but this must be credibly established through specific explanations as to how the beneficiary acquired the knowledge and through relevant comparisons to colleagues or others similarly placed in the industry, and/or through other supporting documentation. Here, the petitioner failed to provide this relevant information and the requested level of detail in its submitted statements and letters and did not establish by a preponderance of the evidence that the beneficiary possesses specialized knowledge. Therefore, the petitioner's assertion that we applied an undue evidentiary burden is not persuasive, and our previous determination will be affirmed.

IV. CONCLUSION

As a final note, the proper filing of a motion to reopen and/or reconsider does not stay the AAO's prior decision to dismiss an appeal or extend a beneficiary's previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO's decision dated June 16, 2014 will be affirmed and the petition will remain denied.

ORDER: The motion is granted and the underlying petition is denied.