U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B-P-USA, INC.

DATE: NOV. 2, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a cosmetic company, seeks to employ the Beneficiary as the general manager of its new office in the United States and to classify her under the L-1A nonimmigrant classification. *See* Immigration and Nationality Act § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The Director, California Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

In denying the petition, the Director concluded that the evidence of record did not establish: (1) that the Beneficiary was employed abroad by a qualifying organization; 2) that the Beneficiary was employed abroad on a full-time basis for one continuous year within three years preceding the filing of the petition; and 3) that the new office will support the Beneficiary in a qualifying managerial or executive capacity within one year of the approval of the petition.

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 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.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) also provides that that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. 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)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

II. FACTS AND PROCEDURAL HISTORY

The Petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on September 16, 2014. The Petitioner provided two supporting statements – one dated May 15, 2014 and another dated August 28, 2014 – discussing the Beneficiary's former employment in Israel and proposed employment in the United States, as well as the nature of the Petitioner's qualifying relationship with the Beneficiary's former employer in Israel. The Petitioner also provided supporting evidence in the form of a business plan for the new office and bank and business documents pertaining to both the United States and foreign entities.

On September 23, 2014, the Director issued a request for evidence (RFE), informing the Petitioner of various evidentiary deficiencies observed upon initial review of the Petitioner's initial evidence. The Director instructed the Petitioner to provide evidence to show, in part, that the Beneficiary was employed abroad for a qualifying entity in a qualifying managerial or executive capacity for the requisite one-year time period and that the Petitioner will have the ability to employ the Beneficiary in a qualifying managerial or executive capacity within one year of the approval of the petition.

The Petitioner's response to the RFE included a statement, dated November 6, 2014, in which the Petitioner listed the supporting exhibits addressing the issues discussed in the RFE.

On November 24, 2014, the Director issued a decision denying the petition. The Director concluded that the Petitioner did not submit sufficient evidence to overcome the findings that were previously cited in the RFE with regard to the Beneficiary's former employment abroad and her proposed employment with the petitioning U.S. entity.

On December 22, 2014, the Petitioner filed an appeal followed by a brief and additional documentation. The Director declined to treat the appeal as a motion and forwarded the matter to this office for review.

III. THE ISSUES ON APPEAL

As indicated above, the findings issued in the Director's decision require us to address issues concerning the Beneficiary's former employment abroad as well as her proposed position with the petitioning entity.

A. Beneficiary's Employment Abroad

In addressing the Beneficiary's foreign employment, it is critical to note that the Petitioner's burden is three-fold. The Petitioner must establish: (1) that the Beneficiary's foreign employer is a qualifying organization; (2) that the Beneficiary was employed by that qualifying organization on a full-time basis for at least one continuous year within the three years preceding the filing of this petition; and (3) that the Beneficiary's one year of continuous employment with the qualifying entity was in a qualifying managerial or executive capacity. In the present matter, the Director's decision focused on the first two elements of the foreign employment requirement.

1. Employment with a Qualifying Organization

We will first address the issue of whether the Beneficiary was employed abroad by a qualifying organization. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G)(*1*). 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).

On the Form I-129 Supplement L, the Petitioner stated that the Beneficiary's last foreign employer was , located in Israel.[1] The Petitioner stated that owns 501 shares, or a 51% interest in the petitioning company.

In support of the petition, the Petitioner provided a copy of its articles of incorporation, filed which indicate that it is authorized to issue 1000 shares of stock. The Petitioner also submitted a document titled "Stock Purchase Agreement," which indicates that on the Petitioner sold 501 of its 1,000 authorized shares to in exchange for a cash

[1] The name of this company also appears as in the record.

payment of $501. The Petitioner also provided its own corporate resolution, showing a filing date of April 14, 2014, which memorializes the Petitioner's acceptance of $501 in exchange for its issuance of 501 shares of its stock to

The Petitioner's initial evidence included the certificate of incorporation and articles of association for , which was established in Israel in The articles of association indicate that issued 100 of its 50,000 authorized shares to

The Petitioner also provided a letter dated September 4, 2014, on the letterhead of , and signed by director of marketing and sales. states that the following companies "are under the same ownership of The letter includes the company number for each company. The number given for is which is the same number assigned to in its certificate of incorporation.

The Petitioner submitted a letter dated October 31, 2006 from an Israeli attorney, who stated that is the owner of and .

The Petitioner also submitted: (1) a letter on letterhead dated June 19, 2014 indicating that this company, with company number employed the Beneficiary from January 1, 2008 until August 1, 2012; (2) the Beneficiary's undated pay slip issued by with corporate ID number which indicates that she joined this company on "01/11/2012"; and (3) an employee list for which identifies the Beneficiary as holding the position of Store Manager."

In response to the RFE, the Petitioner submitted a copy of its stock certificate, dated and a corresponding stock ledger, which indicate that the Petitioner issued 501 shares of its stock to via certificate no. 101. In an effort to resolve this apparent inconsistency between documents that seemingly indicate that the Petitioner sold stock to two different entities, the Petitioner explained that changed its name to on November 24, 2013. In support of this claim, the Petitioner provided a document titled, "Certificate of [C]hange of [N]ame" and the corresponding English translation, which states that with the company number , changed its name to and would be called from that date forward.

The Petitioner also submitted a letter dated October 28, 2014 from CPA who states that, according to the registrar of companies, are affiliated companies, which are both wholly owned by The Petitioner also provided a copy of a letter from from January 2008, addressed to , which certifies that owns 99% of and 100% of

The Petitioner submitted the Beneficiary's pay slips for the months of April through July 2012, which show that she was paid by [redacted] which has corporate ID number [redacted]

In reviewing the above, we find that the name change document is not sufficient to fully resolve the above described inconsistencies, although we acknowledge that the documents in the record indicate that both [redacted] and [redacted] use the same company number. Namely, it is unclear why, if the Petitioner's owner underwent a name change in November 2013, it continued to use the original name in official documents, such as the stock purchase agreement and the Petitioner's corporate resolution, both executed in [redacted] and in the petition itself, which was filed approximately ten months after the name change document was executed. We note that the Petitioner did not provide evidence nor did it make any claims, at the time of filing, to establish that the claimed foreign employer – [redacted] – used any name other than the one cited in the petition and stock purchase agreement.

Further, the record contains unresolved inconsistencies with respect to the identity of the Beneficiary's foreign employer. Even if we acknowledge that [redacted] are the same company, and that this company is the Petitioner's parent company, there is insufficient evidence to support the Petitioner's assertions that the Beneficiary actually worked for [redacted], or evidence that she worked for a qualifying parent, subsidiary or affiliate of that company.

The Petitioner has submitted a total of five pay slips for the Beneficiary. The one provided at the time of filing was not dated and was not accompanied by a copy of the original Hebrew language document. However, it appears to have been issued in 2012 and indicates that the Beneficiary became an employee of [redacted] in January 2012. The company number for this entity is not the same as that provided for [redacted] but rather is the number provided for [redacted] In response to the RFE, the Petitioner provided the Beneficiary's pay stubs indicating that she was employed by [redacted] from April to July 2012. The company number for this employer corresponds to that provided for [redacted] according to a letter dated October 31, 2006 and to [redacted] according to a letter dated September 4, 2014.

Therefore, in order to establish eligibility in this matter, the Petitioner must clearly identify the ownership of all entities that employed the Beneficiary during the three-year period preceding the filing of the petition. The record contains only unsupported statements from attorneys and accountants indicating that [redacted] are qualifying affiliates of [redacted] (now known as [redacted] However, the Petitioner has not provided consistent evidence indicating which company employed the Beneficiary, nor has it provided sufficient evidence of ownership for the foreign entities, as the record contains evidence of only the original stock issuance made by [redacted] to [redacted] and no supporting evidence of the ownership of [redacted] and [redacted] such as copies of their articles of association.

Given the discrepancies and omissions in the record, the Petitioner has not consistently identified the Beneficiary's foreign employer or its relationship with the Petitioner's claimed parent company. Accordingly, the Petitioner has not established that the Beneficiary was employed with a qualifying organization abroad.

2. One Year of Continuous Employment Abroad

The second issue to be addressed is whether the Petitioner established that the Beneficiary 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. *See* 8 C.F.R. § 214.2(l)(3)(iii).

Even if the Petitioner had established that the Beneficiary was employed by a qualifying organization abroad, the record does not establish that the Beneficiary was employed abroad for one continuous year during the relevant three-year time period, which we determine based on the instant petition's filing date of September 11, 2014. Therefore, the Petitioner must establish that the Beneficiary was employed abroad by a qualifying organization on a full-time basis for one continuous year between September 11, 2011 and September 11, 2014. At the time of filing, the Beneficiary had been in the United States continuously since December 16, 2012. Therefore, the Petitioner must establish that her one year of employment abroad took place between September 11, 2011 and December 15, 2012, as the time she spent in the United States cannot be counted towards her year of qualifying employment abroad. *See* 8 C.F.R. § 214.2(l)(1)(ii)(A).

As discussed, the Petitioner provided inconsistent evidence and information with regard to the Beneficiary's employer and her time period of employment abroad. On the Form I-129, the Petitioner identified the Beneficiary's employer abroad as and indicated that the Beneficiary's period of employment was from December 2011 through December 16, 2012. Where asked to explain any interruptions in employment, the Petitioner noted that the Beneficiary visited the United States "in December 2011." It did not provide the specific time period of her visit such that would allow us to determine whether the Beneficiary's absence interrupted her claimed period of employment abroad. At the same time, where asked to summarize the Beneficiary's education and work experience, the Petitioner stated that the Beneficiary worked for as a Retail Store Branch Manager "since 2008."

We also reviewed the Petitioner's original Exhibit E, which included two documents that are relevant to the issue of the Beneficiary's former employment abroad. First, the exhibit included an undated pay stub, which named the Beneficiary's employer as with corporate ID number of – to be distinguished from – and showed the Beneficiary's "job start" date as January 11, 2012, but did not specify the time period for which she was paid. Exhibit E also included a statement dated June 19, 2014 from CEO, who claimed that the Beneficiary "was employed in our company from 1/01/2008 to 8/01/2012". We find that neither of these documents is consistent with the Petitioner's original claim in terms of the name of the employing entity or the specified time period of employment. As indicated above, the information provided in the petition identified as the Beneficiary's original employer and indicated that the Beneficiary's employment abroad

commenced in December 2011 and continued until December 16, 2012. Neither of the documents included in Exhibit E supports the assertions the Petitioner originally made in the Form I-129 Supplement L.

As noted, the Petitioner initially submitted an employee list identifying the Beneficiary as holding the position of , with corporate and in response to the RFE, submitted pay stubs indicating she was employed by with corporate from April through July 2012. Again, neither of these corporate IDs is associated with which has corporate number The Petitioner's claim on appeal that and are all the same entity is not supported by the evidence of record, which shows that each of these companies has a distinct company ID number. This is not, as the petitioner asserts, simply a "semantic difference." The Petitioner has not provided sufficient supporting evidence that the Beneficiary was ever employed by

Moreover, the pay stubs that were submitted show that the Beneficiary worked only six days and 52.5 hours in both April and May 2012, 17 days in June 2012, and 11 days and 65 hours in July 2012, hours which are not consistent with full-time employment. In addition, the Director observed that the Beneficiary was in the United States in B-2 status between August 7, 2012 and November 26, 2012, and then returned to the United States on December 17, 2012.

Nevertheless, the Petitioner claims on appeal that the Beneficiary was employed on a full-time basis between September 12, 2011 and December 17, 2012, "notwithstanding her statements and visits to the United States as a B-2 visitor, because as a family member she performed duties and received a salary from the qualifying organization." The Petitioner emphasizes that any company that paid the Beneficiary is one of the "interrelated, affiliated companies owned by the family, of which the beneficiary is a member." The Petitioner further asserts that the Beneficiary "was on the company's payroll even when she went to visit the United States, where she worked from home when required, and paid as a full-time employee." The Petitioner states that it submitted paychecks for full-time employment during the totality of the required period.

The Petitioner also submits a letter from the Beneficiary's father who states in an affidavit dated December 17, 2014 that the Beneficiary has been "working in until now" from the family's home in by providing marketing support and social media services for the marketing department. He explains that "[t]hat is also the reason that we declare her as a paid employee and we issued her paycheck until December 2012 despite the fact that she ostensibly left Israel [i]n [A]ugust."

Again, while the Petitioner has submitted written statements from the foreign entity's attorney, accountant, and its owner/CEO, such attestations cannot and will not serve as an adequate substitute of documentary evidence that is sufficient to clarify which company or companies actually employed the Beneficiary, whether those companies were all qualifying organizations, and whether her employment was full-time and continuous for a period of at least one year between September

2011 and December 15, 2012. Further, the time the beneficiary spent in the United States between August and November 2012, while it would not interrupt her one year of continuous employment abroad, cannot be counted towards the required one year period. *See* 8 C.F.R. § 214.2(l)(1)(ii)(A).

In this case, based on the number of discrepancies and omissions in the Petitioner's evidence , the record does not support a finding that the Beneficiary was employed abroad on a full-time, continuous basis by a qualifying organization for at least one year in the three years preceding the filing of the petition. *See* 8 C.F.R. § 214.2(l)(3)(iii). For this additional reason, the appeal will be dismissed.

B. Proposed Employment in the United States

Finally, we will briefly address the Beneficiary's proposed employment with the petitioning U.S. entity. The Director denied the petition, in part, based on a finding that the Petitioner did not establish that the Beneficiary would be employed in a qualifying capacity within one year of the approval of the new office petition.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). The applicable regulations here require the Petitioner to provide information regarding the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

In the present matter, the Petitioner's business plan is very general and does not outline the process and timeline for hiring additional employees who would take over the Petitioner's daily operational tasks such that the Beneficiary could focus her time primarily on the performance of tasks within a qualifying managerial or executive capacity.

Further, the Petitioner did not provide a detailed job description identifying the job duties the Beneficiary would perform within the first year of the Petitioner's operation and those she would perform thereafter. When examining whether a beneficiary will be employed in a qualifying managerial or executive capacity, we will look first to the petitioner's description of the job duties.

See 8 C.F.R. § 214.2(l)(3)(ii). Here, the Petitioner's vague job description fails to demonstrate how the Beneficiary's role within the petitioning entity would evolve from having to operate within the context of a start-up company to operating within the scheme of a developed organization whose organizational hierarchy is adequately complex such that it can support the Beneficiary in a primarily managerial or executive capacity. 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. at 604.

Although the Petitioner disputes the Director's findings on appeal, it has not provided sufficient supporting evidence to overcome those findings. Accordingly, we find that the record lacks sufficient evidence to establish that the United States enterprise will more likely than not grow to the point that it will reasonably require the full-time services of an employee who would primarily perform qualifying managerial or executive duties. On the basis of this additional adverse conclusion, the instant petition cannot be approved.

C. Prior Petition

Beyond the decision of the Director, it is noted that the Petitioner indicated under penalty of perjury in Part 4 of the Form I-129 that the Beneficiary had never been denied the requested classification. This petition was filed on September 11, 2014. In fact, the Petitioner previously filed a Form I-129 requesting L-1A classification on behalf of the Beneficiary which was denied on July 25, 2014 The regulations at 8 C.F.R. § 214.2(l)(2)(i) state that "[f]ailure to make a full disclosure of previous petitions filed may result in a denial of the petition." As the Petitioner indicated on the petition that the Beneficiary had never been denied the requested classification, and the Petitioner did not fully disclose the previously filed petition, this petition will be denied for this additional reason as a matter of discretion.

We may deny an application or petition that fails to comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

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 B-P-USA, Inc.*, ID# 12651 (AAO Nov. 2, 2015)