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U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-USA CORP.

DATE: OCT. 8, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: I-129, PETITION FOR NONIMMIGRANT WORKER

The Petitioner, a new entity intending to operate as a provider of financial educational resources and financial literacy courses, seeks to employ the Beneficiary as an L-1A nonimmigrant intracompany transferee. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L); 8 U.S.C. § 1101(a)(15)(L). The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before us on appeal. The appeal will be dismissed.

The Petitioner, a Florida corporation established in [redacted] claims to be the subsidiary of [redacted] It seeks to employ the Beneficiary as the President of its new office in the United States for a one-year period.

The Director denied the petition, finding that the evidence of record did not establish that the Beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

On appeal, the Petitioner contests the Director's decision and submits a brief and additional evidence.

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.

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.

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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states 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.

II. EVIDENTIARY STANDARD

As a preliminary matter, and in light of the Petitioner's references to the requirement that we apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

> Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.
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> . . . .

> The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.
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> . . . .
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> Thus, in adjudicating the application 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.
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> Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support the Petitioner's contentions that the evidence of record establishes eligibility for the benefit sought.

III. FACTS AND PROCEDURAL HISTORY

The Petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on October 3, 2014. The record contains a number of supporting documents pertaining to the Beneficiary's foreign and proposed employers and his respective positions therein. In a supporting statement dated September 29, 2014, the Petitioner stated that the Beneficiary has been working for the foreign entity, with no interruptions, from August 1, 2012 to the present in the positon of business director.

On October 16, 2014, the Director issued a request for evidence (RFE), instructing the Petitioner to provide evidence pertaining to various eligibility factors. Among the issues addressed was that of the Beneficiary's employment abroad. Specifically, the Director questioned whether the Beneficiary was employed abroad by a qualifying entity for the statutorily required time period in light of information he provided on a tourist visa application, where he claimed that his current employer is [redacted] rather than [redacted], which is the entity that was identified on the Form I-129 and the one with which the Petitioner claims to have a parent-subsidiary relationship, wherein the Petitioner is the subsidiary of the latter entity.

In response, the Petitioner provided a statement, dated November 26, 2010,[1] claiming that the Beneficiary's initial period of employment with was from January 2010 to December 2011 and that the Beneficiary resumed his employment with that entity in August 2012. In an effort to reconcile the inconsistent claim the Beneficiary made in his tourist visa petition, where he indicated that his current employer is , the Petitioner explained that is a franchisee of where the Beneficiary did work on behalf of the Beneficiary's claimed employer abroad. The Petitioner further asserted that the Beneficiary "misunderstood the question about his place of working rather than the employer name and mistakenly entered instead of

On December 16, 2014, the Director issued a decision denying the petition. The decision contemplated one of the key issues addressed in the RFE – the Beneficiary's time period of employment abroad with a qualifying entity – and summarized the evidence the Petitioner submitted in response thereto. The decision further pointed out that the Beneficiary came to the United States on a B-2 nonimmigrant visa from September 2013 to October 2013 and from June 2014 through the date of the denial. The decision stated that these absences are inconsistent with payment receipts, which indicate that the Beneficiary was contracted to work in Brazil during a time when he was actually in the United States and was therefore absent from his employment abroad.

On January 13, 2015, the Petitioner filed an appeal contesting the denial of the petition.

Based on our own comprehensive review of the record and for the reasons provided in our discussion below, we find that the Petitioner has not provided sufficient evidence to overcome the chief basis for denial. While we have considered all evidence that has been submitted into the record, we will specifically reference only those submissions that are relevant to the Beneficiary's proposed position with the U.S. entity.

IV. THE ISSUE ON APPEAL

As indicated above, the primary issue to be addressed in this decision calls for an examination of the Beneficiary's time period of employment with the foreign entity that is the parent in the Petitioner's parent-subsidiary relationship.

According to 8 C.F.R. § 214.2(l)(3)(iii), a petitioner must submit evidence that the alien it seeks to employ 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.

As previously indicated, in its original supporting statement, dated September 29, 2014, the Petitioner claimed that the Beneficiary had been working for the foreign entity, with no interruptions, from August 1, 2012 to the present in the positon of business director. On appeal, the

[1] Based on references to the October 16, 2014 RFE, it appears that the date on the RFE response statement was a typographical error and was intended to show November 26, 2014 as the date the statement was written.

Petitioner restates its prior explanation, claiming that the Beneficiary misread "the visa application question about where he works instead of who his employer is." We find that this explanation is insufficient to overcome the sound objections expressed in the denial. Contrary to the Petitioner's assertions, the question on the tourist visa application is unambiguous and not subject to multiple interpretations. Rather, it unequivocally and expressly asks the Beneficiary to identify his "Present Employer." The question does not ask the Beneficiary to identify the location where he currently provides services. The Beneficiary clearly identified as his "Present Employer" and provided the named employer's address and phone number along with his monthly salary of 6000 "in local currency," information which is different from that pertaining to the Beneficiary's claimed employment with where, according to the same tourist visa petition, the Beneficiary was employed from January 2, 2010 to December 1, 2011. In fact, even if, *arguendo*, the Beneficiary was to have misinterpreted the question about his current employer, it is unclear why he claimed a different monthly salary of 6000 reis, rather than 7000 reis, which is the salary he claimed he was receiving during his alleged employment with . If the Beneficiary had resumed his employment with the latter entity in 2012, as claimed in letters and documents that were submitted in response to the RFE, it is unclear why that entity was not also identified as the Beneficiary's current employer.

Further, with regard to the October 25, 2014 letter from owner of , the claim that the Beneficiary's weekly visits to were limited to five hours per day as a result of franchisor-franchisee relationship with , this claim does not appear to be substantiated by any of the express terms found in the franchise agreement between the two entities. It is unclear why the Beneficiary would claim as his employer if the time he spent at was limited, as claimed in the October 25, 2014 letter. The fact that the Beneficiary claimed as his employer negates not only claims, but further undermines the claims the Petitioner is currently making in support of the instant petition.

While the Petitioner offers numerous receipts showing wages that the purportedly paid the Beneficiary since he allegedly resumed his employment in August 2012, these internally generated documents are not sufficient to overcome the grave inconsistencies that were created as a result of the information the Beneficiary provided in an unrelated nonimmigrant tourist visa application. Further, a review of the Beneficiary's resume, which was provided in RFE exhibit 10, indicates further confusion regarding claims pertaining to the employment abroad. While the Beneficiary disclosed the original period of employment with from January 2, 2010 to December 1, 2011, he also claimed to have had over three years of employment with from January 5, 2009 to July 30, 2012, thus indicating that he held two competing (and possibly full-time) positions with two different employers for a period of approximately two years. The record contains no evidence or information clarifying and/or reconciling this apparent anomaly. Furthermore, while the Petitioner claims on appeal that the Beneficiary's brief absences from his employment abroad for the purpose of vacationing in the United States should not be considered as interruptive of the Beneficiary's qualifying employment abroad, it is unclear why the Petitioner neglected to disclose any absences in Section 1, No. 5 of the Form I-129 Supplement L, where the Petitioner expressly indicated that the Beneficiary was

employed at [redacted] from August 1, 2012 to the present, with no interruptions, and did not disclose the original period of employment from January 2010 to December 2011.

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). We further note that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Id.* at 591-92. Simply asserting that the information the Beneficiary provided in an unrelated nonimmigrant tourist visa application was an unintentional error does not qualify as independent and objective evidence. 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). Furthermore, evidence that a petitioner creates after U.S. Citizenship and Immigration Services points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice. After considering the totality of the evidence presented in the instant record of proceeding, we find that the petitioner has provided no contemporaneous documentation to properly address the inconsistencies described herein. The petitioner has not resolved the above described anomalies and inconsistencies through the submission of competent objective evidence.

Here, the record shows that the Beneficiary made statements in an unrelated travel document application that are inconsistent with evidence offered in support of the instant petition. Given the lack of sufficient contemporaneous evidence to resolve the Beneficiary's inconsistent claims, we find that the information offered in support of the instant nonimmigrant petition is unreliable and does not provide a valid account of the Beneficiary's employment history. As such, we find that the Petitioner has not provided sufficient credible evidence to establish that the Beneficiary was employed abroad by a qualifying entity for the requisite one year during the relevant three-year time period and on the basis of this finding the instant petition cannot be approved.

V. CONCLUSION

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 D-USA Corp.*, ID# 13639 (AAO Oct. 8, 2015)