U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF R-USA LLC

DATE: OCT. 6, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a provider of project management consulting services in the hospitality industry, seeks to temporarily employ the Beneficiary as its vice president under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in an executive or managerial capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner did not establish that: (1) the Beneficiary's position in the United States would be in a managerial or executive capacity, and (2) its foreign parent entity continues to do business.

The matter is now before us on appeal. In support of its appeal, the Petitioner submits additional evidence and asserts that the Director's findings were incorrect.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1 nonimmigrant visa classification, a qualifying organization must have employed the Beneficiary in a 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.[1] 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.[2]

[1] Section 101(a)(15)(L) of the Act.
[2] *Id.*

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, 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. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The first issue to be addressed in this decision is the Beneficiary's proposed employment. The Director denied the petition based on a finding that the Petitioner did not establish that the Beneficiary will be employed in a managerial or executive capacity. The Petitioner does not claim that the Beneficiary will be employed in a managerial capacity. Therefore, we restrict our analysis to whether the Beneficiary will be employed in an executive capacity.

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.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.[3]

A. Evidence of Record

The Petitioner filed the Form I-129 on January 8, 2015. On the Form I-129, the Petitioner indicated that it currently has three employees and a gross annual income of $310,219.

The Petitioner's initial supporting evidence included a statement in which the Petitioner provided the following information about the Beneficiary's proposed position:

> [The] Beneficiary . . . manages [the] US operations as head of [the] company's entire operations in [the] U[.]S[.]A[.] supervising 4 General Managers and their extended team comprising of senior managers and professionals. [The] Beneficiary has complete control to allocate budgets; hire and fire any employee; render decision[-]making on the board of directors; direct operations as he may deem fit; recommend to the Board strategic directions for the Corporation's business, and when approved by the Board, implement the corresponding strategic, business and operational plans; develop and implement operational policies to guide the Corporation; develop and recommend top-level organizational structure and staffing to the Board and direct the implementation of the Board's decisions in this regard; discuss regularly the operations and its activities with the President of [the] company as required[,] etc.
>
> [The Beneficiary] will continue to supervise US Operations function, setting up and reviewing monitor [*sic*] contracts, overseeing the entire US business operation including multi-state payroll and corporate income tax filings and payments, interface with external clients, manage consultants, supervise invoice, billing, accounts receivables, identify opportunities for joint ventures, recruit, develop and manage human resources, maintain morale and motivate employees, design, develop and implement systems in the organization. His focus will continue to be as the Vice President function. He will continue to supervise and head a team of managers and would continue to report to President, US Operations.

The Petitioner also provided an organizational chart showing the Beneficiary as second in command, subordinate only to the company's president. Although the chart depicts the Beneficiary as overseeing four managerial positions – a general manager of accounting, finance, and administration; a general manager of sales and marketing; a general manager of project development; and a project manager – the positions for general manager of project development and general manager of sales and marketing are both vacant. The chart also shows that an unspecified

[3] *See* section 101(a)(44)(C) of the Act.

number of sales staff, accounting and finance staff, and an administration staff are "to be hired" as well as an accounting and finance manager and an administration manager, both of whom the chart shows as subordinate to the general manager of accounting, finance, and administration. Finally, the chart shows that the project manager as well as his subordinate staff of two project coordinators followed by two site supervisors, will perform services on a contractual consultancy basis.

In addition, the Petitioner submitted copies of IRS Forms 941, Employer's Quarterly Federal Tax Returns, for 2013 and 2014. These returns show varying numbers of employee, ranging from 13 employees during the second quarter of 2013 to three employees during the third quarter of 2014.

After reviewing the Petitioner's supporting evidence, the Director determined that the record lacked sufficient evidence to establish the Beneficiary's eligibility and issued a request for evidence (RFE). The Director observed that the Petitioner did not submit evidence to corroborate its claimed use of contractors and further noted that the Petitioner did not provide position descriptions for its three current employees. The Director also instructed the Petitioner to submit, in part, the following additional evidence: (1) a detailed job description listing the Beneficiary's proposed job duties and the percentage of time he would allocate to each duty; (2) an organizational chart accompanied by a summary of job duties, educational levels, and salaries of the employees identified in the submitted organizational chart; and (3) evidence of employee salaries, including the Petitioner's payroll summary and IRS Forms W-2, W-3, and 1099-MISC.

In response to the RFE, the Petitioner submitted a statement containing the following percentage breakdown of the Beneficiary's job duties:

- 25% - Establish a broad authority in decision[-]making process of the company.
- 25% - Complete supervision and management over departmental managers.
- 10% - Development of Project Objectives and Plans.
- 15% - Participate in development, interpretation, evaluation and recommendation of goals, policies and operation of the company.
- 10% - Assigning tasks, delegating authority and motivating team managers.
- 15% - Management overall to ensure work is completed on time and within budget.

The Petitioner further added the following information about the Beneficiary's role within its organization:

> Our company has a somewhat of a centralized authority management. Almost every important decision related to our management operations, projects, plans and controls are made on [a] daily basis by [the Beneficiary]. He has delegated the authority of Hire and Fire of employees to departmental manager [*sic*]. Only in special circumstances such as hiring a functional/departmental manager, he shall oversee this function.

> He has full authority and decision making[-]power to negotiate & execute the contracts and agreements on behalf of the company. Contracts and agreements are not limited to new business developments, new client agreements, renting business locations, new ventures, vendors & suppliers, getting professional help and more.
>
> [The Beneficiary] is also required to create a set of procedures for the departmental managers to perform their duties. Such procedures are following company goals and policies. He's also authorized to participate to make change in [the] company's operation goals and policies. To such effect he has executed semi-annual conference between [the] President and General Partners to discuss and reemploy company goals and policies.
>
> All the departmental managers shall report to him and are tasked by him for all services and operations. He will exercise his authority over the departmental managers, by assigning tasks specific to the management projects and create [*sic*] an obligation to accept the task and at his discretion delegating required authority to perform such services, and evaluating the performance of functional managers also provide guidance & support as and when needed. All departmental tasks are performed by departmental managers on their own authority & establish set of procedures, only special tasks which require planning and organizing to meet explicit clients objectives are overseen & developed by [the Beneficiary].
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> If there are disputes, issues or conflicts between departments to perform specific tasks or gather resources or if the morale is low in the company, he's to clear all disputes and motivate the team managers to resolve them. Such issues between the supervisors and lower management are solved by departmental managers and set of procedures created by [the Beneficiary].
>
> [The Beneficiary] is also authorized to create budgets for [the] company and its products & services and ensure that the services performed are within budgets and clients are satisfied.

The Petitioner also resubmitted IRS Forms 941 for 2013 and 2014 and provided IRS Forms 941 for the first two quarters of 2015, accompanied by adjusted IRS Forms 941 for the 2013 second and third quarters addressing the Director's earlier concerns pertaining to the Petitioner's staffing. The Petitioner did not provide the requested quarterly wage reports for the first quarter of 2015, nor other evidence such as payroll records containing the names, salaries, and number of weeks worked for all employees at the time of filing. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition.[4]

[4] 8 C.F.R. § 103.2(b)(14).

The Director denied the petition concluding, in part, that the Petitioner did not establish that the Beneficiary will be employed in the United States in a managerial or executive capacity. In denying the petition, the Director found that the Beneficiary's listed job duties are not consistent with the nature, scope, and organizational structure of the petitioning entity and that the Petitioner's size and scope would not support the Beneficiary in an executive position.

On appeal, the Petitioner submits a brief asserting that the Beneficiary meets the criteria of the statutory definition of executive capacity in that he will direct the management of the organization and establish the organization's goals and policies as the "top executive." The Petitioner contends that the Beneficiary will oversee a total of 24 employees, including 18 employees of the foreign entity, three employees of the U.S. entity, and three contractors retained under a contractual agreement with [redacted] The Petitioner claims that the Beneficiary will supervise the following four "senior managers": (1) one manager of accounting, finance, and administration; (2) two general managers of project development; and (3) one general manager of sales and marketing.

B. Analysis

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal, we conclude that the Petitioner has not established that the Beneficiary will be employed in an executive capacity in the United States.

When examining the executive capacity of the Beneficiary, we will look first to the Petitioner's description of the job duties.[5] The Petitioner's description of the job duties must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are in an executive capacity.[6]

The definition of executive capacity has two parts. First, the Petitioner must show that the Beneficiary will perform certain high-level responsibilities.[7] Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees.[8]

In the matter at hand, the Petitioner offered a deficient job description that does not establish that the Beneficiary would primarily perform tasks within an executive capacity. Namely, the job description is overly vague and thus does not convey a meaningful understanding of the actual tasks the Beneficiary would perform. Although the Director issued an RFE in which she questioned the Petitioner's ability to support the Beneficiary in an executive capacity with a staff of only three employees and instructed the Petitioner to supplement the record with a job description listing the

[5] *See* 8 C.F.R. § 214.2(l)(3)(ii).
[6] *Id.*
[7] *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision).
[8] *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World, Inc. v. INS*, 940 F.2d 1533.

Beneficiary's typical executive job duties, the Petitioner's response statement broadly focused on the Beneficiary's discretionary authority over subordinates and business matters, but did not specify the Beneficiary's daily tasks or explain how the limited U.S. staff would relieve the Beneficiary from having to allocate his time primarily to nonexecutive functions.

The Petitioner claimed that the Beneficiary would allocate 25% of his time to "[e]stablish a broad authority in decision making process of the company," 10% of his time to the "[d]evelopment of Project Objectives and Plans," and 15% of his time to "[p]articipate in development, interpretation, evaluation and recommendation of goals, policies and operation of the company." These broad duties do not provide sufficient detail of the actual tasks performed by the Beneficiary such that we could conclude that they would be executive in nature. Likewise, the Petitioner's expanded description of the proposed job offered little insight into what the Beneficiary would actually do. For example, the Petitioner stated that the Beneficiary would be "required to create a set of procedures for the departmental managers to perform their duties," but it did not specify any such procedures or state what percentage of the Beneficiary's time would be allocated to this job duty. Similarly, while the Petitioner broadly stated that the Beneficiary would "exercise his authority over all departmental managers, by assigning tasks specific to the management projects," the Petitioner did not clarify how various projects affect the types of tasks he would assign to his subordinates or specify the percentage of time the Beneficiary would allocate to this task.

Furthermore, in light of the Petitioner's repeated claims that the Beneficiary will allocate 35% of his time to supervising and motivating departmental managers, it is critical to address the numerous vacant positions within the U.S. organization as shown in the Petitioner's organizational chart. As previously noted, the Petitioner's original organizational chart, which presumably depicts the Petitioner's staffing at the time of filing, shows that there were no employees in the sales and marketing department and the Petitioner had not yet hired a general manager of project development or a support staff for the general manager of accounting, finance, and administration to manage. Given these staffing vacancies, the Beneficiary's only managerial subordinate staff consisted of a project manager, whom the Petitioner indicated would be retained on a contractual basis, and a general manager of accounting, finance, and administration. In light of the latter position's lack of any support staff, whose positions were included but are shown in the organizational chart as being vacant, the title of "general manager" was in name only, as the individual who occupied the general manager position had no staff to manage or supervise. We further note that the organizational chart's depiction of only one project development general manager is inconsistent with the Petitioner's most recent claim on appeal, where the Petitioner expressly indicated that the Beneficiary would oversee two general managers of project development. The Petitioner has not resolved the latter inconsistency with independent, objective evidence pointing to where the truth lies.[9]

The evidence of record does not indicate that the broad statements in the Beneficiary's job description are an accurate reflection of the Petitioner's organizational hierarchy and its stage of

[9] *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

development at the time of filing. In other words, it is unreasonable to claim that the Beneficiary would allocate more than one third of his time to overseeing a managerial staff that did not yet exist when the petition was filed. The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication.[10] A visa petition may not be approved at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts.[11]

Moreover, the Petitioner does not explain or clarify how its staffing vacancies, particularly in the sales and marketing department, which was devoid of any staff, will affect the Beneficiary and the job duties he would have to perform in order to compensate for the Petitioner's diminished support staff. Having neglected to explain who will perform its sales duties in the absence of a sales staff, the Petitioner has not shown that the Beneficiary does not need to perform those non-qualifying duties himself. While no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner in each instance must establish that the non-qualifying tasks a beneficiary would perform are only incidental to the proposed position. 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.[12]

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization.[13] Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and a beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as an owner or sole managerial employee. A beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization."[14]

Although we do not dispute that the Beneficiary would assume a top position within the Petitioner's organization and exercise discretionary authority over staff and business matters, we cannot overlook the overall absence of a managerial staff for the Beneficiary to direct and the overall lack of administrative and sales personnel, which indicate that the Petitioner lacked the organizational complexity necessary to support the Beneficiary in an executive capacity. While the RFE instructed

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[10] 8 C.F.R. § 103.2(b)(1).
[11] *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).
[12] *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. 593, 604 (Comm. 1988).
[13] Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B).
[14] *Id.*

the Petitioner to provide a quarterly wage report for the first quarter of 2015 listing the names, employee salaries, and wages paid to employees, the Petitioner did not provide this document, thereby limiting our review of the Petitioner's U.S. staffing to a quarterly tax return, which indicates that the Petitioner had, at most, three employees, including the Beneficiary, at the time of filing.

On appeal, the Petitioner claimed for the first time that 18 employees of the foreign entity actually comprise the Petitioner's "[t]eam of managers and associates." However, the Petitioner did not explain how the foreign entity's employees would supplement the U.S. entity's organizational hierarchy and what respective roles they would assume with respect to the Beneficiary in terms of relieving the Beneficiary from having to allocate his time primarily to the performance of administrative and operational tasks. While the Petitioner's RFE response includes the names, job titles, and job descriptions of the foreign management staff, there is no indication in any of their job descriptions that the foreign employees would assist the Petitioner, thereby helping to relieve the Beneficiary from having to primarily perform nonexecutive job duties. Merely claiming that the foreign entity's employees perform tasks for the U.S. entity is insufficient without providing a comprehensive understanding of the organizational complexity and the roles of the Beneficiary's claimed support staff. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.[15]

Moreover, we note that the Petitioner's original statements with regard to its organizational hierarchy are inconsistent with evidence that the Petitioner subsequently provided on appeal and in response to the RFE. Namely, the Petitioner did not originally claim that the foreign entity's staff would be instrumental in supporting the Beneficiary in his role as the Petitioner's vice president. Rather, the Petitioner focused on its U.S.-based staff in its original supporting statement, where it claimed that the Beneficiary would supervise four general managers, whom the Petitioner did not identify by name. The organizational chart that the Petitioner subsequently submitted in response to the RFE depicts eight, rather than four, managerial positions – three in the United States and five abroad – as the Beneficiary's direct subordinates. We note, however, that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements.[16] Furthermore, if USCIS finds reason to believe that an assertion stated in the petition is not true, USCIS may reject that assertion.[17]

In sum, we find that in light of the various deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary will be employed in an executive capacity.

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[15] *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (quoting *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

[16] *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

[17] *See, e.g.*, Section 204(b) of the Act, 8 U.S.C. § 1154(b); *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

III. FOREIGN COMPANY DOING BUSINESS

Next, we will address the Director's finding that the Petitioner did not provide sufficient evidence to establish that the foreign entity continues to do business.

After reviewing the additional evidence that the Petitioner submits on appeal, we find that the Petitioner has overcome the Director's finding regarding the issue of whether the foreign entity continues to do business. Namely, we find that the various tax and business documents are sufficient to establish that the foreign entity continues to provide goods and/or services on a regular, systematic and continuous basis pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(H). Therefore, we hereby withdraw the Director's adverse finding regarding this issue.

IV. WILLFUL MISREPRESENTATION OF A MATERIAL FACT

Beyond the Director's decision, we will also enter a finding of willful misrepresentation of a material fact, concerning the Beneficiary's alleged employment abroad in a managerial or executive capacity in the three years preceding his entry as a nonimmigrant.

Section 212(a)(6)(C) of the Act provides:

> Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

A. Evidence of Record

The Petitioner claims that the Beneficiary was employed abroad by [redacted] 51% owner of the Petitioner, for at least one year preceding the Beneficiary's entry into the United States in F-1 status on December 29, 2007. Specifically, [redacted] president of the Petitioner, stated in a letter: "From June 1, 2005, to December 28, 2007, [the Beneficiary] was employed with [redacted] and that "[w]e had transferred [the Beneficiary] to USA in December 2009 on a temporary basis."

The Petitioner also submitted a copy of a letter, dated December 1, 2009, from [redacted], partner at [redacted] stated that the Beneficiary "was employed at [redacted] as Vice President from 1st June 2005 to 28th December 2007."

The Petitioner also submitted a copy of a diploma from [redacted] in India, showing that the Beneficiary earned "the Degree of Master of E-Business" on January 13, 2008. Accompanying transcripts show that he took seven or eight courses per semester during his first three semesters of graduate study from late 2005 to early 2007, and devoted his fourth semester of graduate study in mid-2007 to preparing and presenting a final project.

The Petitioner submitted copies of letters from teachers and administrators at [redacted][18] For example, [redacted] principal of [redacted] stated that the Beneficiary "is known to me for the last 5 years (2002-2007) as a student of Bachelor of Commerce & Master of E-Business."

Upon reviewing the record on appeal, we uncovered derogatory information, which if unrebutted, would support a finding of willful misrepresentation of a material fact. Prior to his entry into the United States, the Beneficiary applied for an F-1 nonimmigrant (student) visa at the U.S. Consulate in [redacted] on October 26, 2007. In an effort to verify the Petitioner's evidence, we obtained copies of the Beneficiary's application materials.[19] On Form DS-156, the primary visa application form, the Beneficiary stated his "Present Occupation" as "Student Completed" and listed his 2002-2007 studies at [redacted] The Beneficiary did not identify [redacted] or claim any current employment.

Asked to identify his "Last Two Employers" on Form DS-157, the Beneficiary listed the following:

Management Trainee at [redacted] June 1, 2006-July 31, 2006
Dealer at [redacted] February 13, 2007-July 31, 2007

On Form DS-158, the Beneficiary listed the same two employers under "Work Experience – Previous." The section marked "Work Experience – Present" is blank. The Beneficiary signed the application forms, certifying that the information they contained was "true and correct to the best of [his] knowledge and belief."

In a combination Notice of Intent to Dismiss (NOID) and RFE, we advised the Petitioner that the Beneficiary's visa application documents did not show employment with [redacted] even though the Beneficiary supposedly worked for that company at the time he completed the forms. We found that the Beneficiary's employment claims contradict one another, as the Beneficiary did not claim employment with [redacted] until he sought immigration benefits for which the Beneficiary's employment with [redacted] was a prerequisite. We also questioned the Beneficiary's residence during the time of his claimed studies and employment.

In response, the Petitioner submits copies of previously submitted documents and an affidavit from the Beneficiary attesting to his employment history abroad. Some of these materials address and resolve the questions regarding the Beneficiary's residence. Other submitted documents concern the Beneficiary's studies and employment.

[18] The college's full name is [redacted] The college is part of [redacted]

[19] Form DS-156, Nonimmigrant Visa Application; Form DS-157, Supplemental Nonimmigrant Visa Application; and Form DS-158, Contact Information and Work History for Nonimmigrant Visa Applicant

B. Analysis

For the reasons discussed below, we find that the Petitioner willfully submitted false documents and misrepresented facts that are material to issues concerning the Petitioner's and the Beneficiary's eligibility for the immigration benefit sought in this proceeding.

The information in the record prior to the denial was not sufficient to support a finding of willful misrepresentation of a material fact. However, the additional information found in the Beneficiary's nonimmigrant visa application actively contradicts the Petitioner's claims about the Beneficiary's employment in the years leading up to his to his entry into the United States in 2007.

In a new affidavit submitted on appeal, the Beneficiary states that he worked full time for and that his positions at and were "Industrial Training Internships" that were part of his studies at The Beneficiary states that these internships only took place on weekends, and therefore they did not interfere with his employment at The Beneficiary also states that his "college attendance hours were 6:00 PM to 10:00 PM 3 to 4 days a week."

The Petitioner submits documentation from indicating that the fourth semester of the Beneficiary's master's degree program involved an "Industry Internship and Comprehensive Report Writing." The previously submitted transcripts described the fourth semester's major activity as "E-Business Project Training and its Report Submission."

On Form DS-158, which the Petitioner acknowledges but does not submit, the Beneficiary described himself as a "Management Trainee" at and an "Associate Dealer" at The "Management Trainee" title appears to be compatible with the Beneficiary's claim of an internship, the "Associate Dealer" title less so; but if these were both training internships, as the Beneficiary now maintains, then the question arises as to why the Beneficiary would require low-level training at a time when he was already the vice president of

In response to our NOID/RFE, the Petitioner submits a copy of the Beneficiary's Form DS-157, and notes that "item #12 did not require information about current employer." Although this assertion is correct, Form DS-157 is only one of three forms that the Beneficiary submitted when he filed his nonimmigrant visa application. Form DS-157 is clearly marked as a "Supplement" to the main application form (Form DS-156).

Unlike Form DS-157, Form DS-156 did ask specifically for information about the Beneficiary's then-current employment, and therefore there was no need to repeat that information on the supplement. As noted previously, the Beneficiary listed his "Present Occupation" as "Student Completed" on Form DS-156. Line 20 of Form DS-156 asked the Beneficiary to list the "Name and Address of Present Employer or School." The Beneficiary left the line blank.

Likewise, on Form DS-158, the Beneficiary left the "Work Experience – Present" line blank. The Petitioner's latest brief contains a specific reference to "Item #4 of Form DS-158," indicating detailed familiarity with the form, but the Petitioner does not address the portion of that form that concerns "Work Experience – Present."

The Beneficiary completed all three visa application forms at the same time, but the Petitioner's response to our NOID/RFE includes only Form DS-157, which is the only form that did not ask for information about the Beneficiary's then-current employment. The Petitioner did not submit copies of Forms DS-156 or DS-158, where the Beneficiary could have, but did not, claim employment with

Upon review of the evidence, we find that the Petitioner has not overcome our key concern expressed in the NOID/RFE: that the Beneficiary provided employer information on his nonimmigrant visa application forms in October 2007, but did not mention Several years later, the Beneficiary sought immigration benefits that rely, in part, on a claim of employment at in 2007. The Petitioner has not overcome this major discrepancy.

With respect to the claim that the Beneficiary was a part-time student at while working full-time for the transcripts show that the Beneficiary took up to eight courses per semester. The Petitioner has not shown how this course schedule is compatible with what the Petitioner and the Beneficiary claim was part-time study.

On balance, we conclude that the Beneficiary did not work for and that the materials relating to that claimed employment are not authentic. The alternative – that the Beneficiary either neglected or forgot to mention that he was actively serving as the vice president of a company when he filled out his nonimmigrant visa application – is implausible.

USCIS will deny a visa petition if the petitioner submits evidence which contains false information. In general, a few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits.[20] However, if a petition includes serious errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after an officer provides an opportunity to rebut or explain, then the inconsistencies will lead USCIS to conclude that the claims stated in the petition are not true.[21]

In this case, the discrepancies described lead us to conclude that the documents submitted to show that the Beneficiary was vice president of from 2005 to 2007, are neither true nor credible. This evidence is material to the regulatory criteria at 8 C.F.R. § 214.2(l)(3)(iii). When given an opportunity to rebut these findings, the Petitioner submitted an incomplete copy of the Beneficiary's nonimmigrant visa application, with an explanation that does not account for the other

[20] *See Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003).
[21] *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

forms in that application. The Petitioner has also submitted newly executed affidavits rather than verifiable documentation that can be reliably dated to the period in question. We conclude that the Petitioner submitted false documentation, including letters and pay receipts for employment that did not actually take place.

As outlined by the Board of Immigration Appeals, a material misrepresentation requires that one willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled.[22] The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise.[23] To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded."[24]

Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, the officer must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material.[25]

First, as previously discussed, the Petitioner provided USCIS with false documents intended to establish that the Beneficiary worked abroad for [redacted] A misrepresentation can be made to a government official in an oral interview, on the face of a written application or petition, or by submitting evidence containing false information.[26] Here, the submission of falsified letters and payroll documents in support of this nonimmigrant petition constitutes a false representation to a government official.

Second, we find that the Petitioner willfully made the misrepresentation. The Petitioner has submitted a copy of a letter dated December 1, 2009, from [redacted] to [redacted] purporting to recommend the Beneficiary for a transfer from [redacted] to the petitioning company. If the Beneficiary did not work for [redacted] the Petitioner would not have received this letter in 2009 and would have known that claims regarding the Beneficiary's past employment contained false information. We conclude that the correspondence relating to the claimed recruitment is not authentic, and was created specifically to support the petition and, thereby, procure immigration benefits for the Beneficiary.

Third, the evidence is material to the Beneficiary's eligibility. To be considered material, a false statement must be shown to have been predictably capable of affecting the decision of the decision-

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[22] *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975).
[23] *See Matter of Tijam*, 22 I&N Dec. 408, 425 (BIA 1998); *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979).
[24] *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).
[25] *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); Matter *of Kai Hing Hui*, 15 I&N Dec. at 288.
[26] INS Genco Op. No. 91-39, 1991 WL 1185150 (April 30, 1991).

making body.[27] In the context of a visa petition, a misrepresented fact is material if the misrepresentation cut off a line of inquiry which is relevant to the eligibility criteria and that inquiry might well have resulted in the denial of the visa petition.[28] The misrepresentations cut off a potential line of inquiry regarding the Beneficiary's employment history, which is directly material to the Beneficiary's eligibility under the statutory requirement that the Beneficiary must have worked abroad as a manager or executive.[29]

In light of the contradictory evidence and information we described above, we find that the Petitioner knowingly submitted documents containing false statements in an effort to mislead USCIS on an element that is material to the Beneficiary's eligibility for a benefit sought under the immigration laws of the United States. *See* 18 U.S.C. §§ 1001, 1546. Therefore, we hereby enter a finding of willful misrepresentation of a material fact against the Petitioner. This finding of willful material misrepresentation shall be considered in any future proceeding where admissibility is an issue.

V. 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, the burden of proving eligibility for the benefit sought remains with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of R-USA LLC*, ID# 124386 (AAO Oct. 6, 2016)

[27] *Kungys v. U.S.*, 485 U.S. 759 (1988).
[28] *See Ng*, 17 I&N Dec. at 537.
[29] *See* section 101(a)(15)(L) of the Act. *See also* 8 C.F.R. § 214.2(l)(3)(iii).