U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF F-G-G-[redacted]

DATE: DEC. 28, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an eight-employee engineering and consulting firm, seeks to temporarily employ the Beneficiary as a field service engineer under the L-1B nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1B classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee with "specialized knowledge" to work temporarily in the United States.

The Director of the Vermont Service Center denied the petition, concluding that the record did not establish, as required, that a qualifying relationship exists between the Petitioner and the Beneficiary's foreign employer.

On appeal, the Petitioner asserts that the Director did not apply the preponderance of the evidence standard, did not follow the correct procedure when issuing the request for evidence (RFE), and erred when determining that a qualifying relationship did not exist between the Petitioner and the Beneficiary's foreign employer.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1B nonimmigrant visa classification, a qualifying organization must have employed the beneficiary "in a capacity that is managerial, executive, or involves specialized knowledge," for one continuous year within three years preceding the beneficiary's application for admission into the United States. Section 101(a)(15)(L) of the Act. 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 specialized knowledge capacity. *Id.* The petitioner must also establish that the beneficiary's prior education, training, and employment qualifies him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

II. QUALIFYING RELATIONSHIP

To establish a "qualifying relationship," 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* section 101(a)(15)(L) of the Act; *see also* 8 C.F.R. § 214.2(l)(1)(ii) (providing definitions of the terms "parent," "branch," "subsidiary," and "affiliate").

The Director determined that the record does not demonstrate that a common parent or a group owned and controlled by the same parent, or individual, own and control both the Petitioner and the foreign entity; or that the same group of individuals own and control approximately the same share or proportion of the Petitioner and the foreign entity.

The Petitioner stated on the Form I-129 that the Petitioner, "through its officers owns and controls 99% of the foreign company, ." The Petitioner indicated that the qualifying relationship arises from the common ownership that each officer has in the Petitioner and in the Beneficiary's foreign employer.

The ownership of the two companies is not in dispute. Five members each own 200 units or a 20 percent interest in the Petitioner as follows:

- dated December 2, 2014 - 20 percent
- dated December 2, 2014 – 20 percent
- dated December 2, 2014 – 20 percent
- – 20 percent
- – 20 percent

Four members own the Beneficiary's foreign employer's 17,000 issued units as follows:

- – 5,666 units
- – 5,667 units
- – 5,666 units
- 1 unit

Regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities. *See, e.g.*, *Matter of Church Scientology Int'l*, 19 I&N Dec. 593 (Comm'r 1988); *Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). Ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology Int'l*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, a certificate of formation or organization of a limited liability company (LLC) alone is not sufficient to establish ownership or control of an LLC. LLCs are generally obligated by the jurisdiction of formation to maintain records identifying members by name, address, and percentage of ownership, and written statements of the contributions made by each member, the times at which additional contributions are to be made, events requiring the dissolution of the limited liability company, and the dates on which each member became a member. These membership records, along with the LLC's operating agreement, certificates of membership interest, and minutes of membership and management meetings, must be examined to determine the total number of members, the percentage of each member's ownership interest, the appointment of managers, and the degree of control ceded to the managers by the members. Additionally, a petitioning company must disclose all agreements relating to the voting of interests, the distribution of profit, the management and direction of the entity, and any other factor affecting control of the entity. *Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362. Without full disclosure of all relevant documents, U.S. Citizenship and Immigration Services is unable to determine the elements of ownership and control.

The Petitioner must establish that it and the foreign employer share common ownership and control. Control may be "*de jure*" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "*de facto*" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289.

In this case, five individuals own the U.S. entity and four individuals own the foreign entity. Three of the four individuals and own and control the foreign entity with their 99 percent interest in the foreign entity. The same three individuals and are managing partners of the Petitioner. Two of the Petitioner's members and affirm that they are no longer active in the Petitioner's operations. However, the record does not include evidence that these two members have relinquished their membership (voting) rights in the Petitioner. Absent documentary evidence such as voting proxies or agreements to vote in concert, the Petitioner has not established that the same individuals control both entities. That is, various combinations of the Petitioner's five members could vote in concert against the interests of the individuals controlling the foreign entity. Thus, the companies are not affiliates as the same individuals do not own and control both entities. Based on the evidence submitted, the Petitioner has not established that it has a qualifying relationship with the Beneficiary's foreign employer.

III. SPECIALIZED KNOWLEDGE

Although the Director did not address the Beneficiary's specialized knowledge, we find that this issue presents another ground for denial.

The relevant statutory definition states that a beneficiary is considered to be serving in a capacity involving specialized knowledge with respect to a company if the beneficiary 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. Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B).

Specialized knowledge is also defined as 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. 8 C.F.R. § 214.2(l)(1)(ii)(D).

As a threshold issue, the Petitioner must establish that the Beneficiary possesses specialized knowledge. If the evidence is insufficient to establish that he possesses specialized knowledge, then the Petitioner cannot establish that he has been employed abroad and would be employed in the United States in a specialized knowledge capacity.[1]

A petitioner may establish eligibility for an L-1B visa by submitting evidence that the beneficiary and the proffered position satisfy either prong of the statutory definition. Under the statute, a beneficiary is deemed to have specialized knowledge if he or she has: (1) a "special" knowledge of the company product and its application in international markets; or (2) an "advanced" level of knowledge of the processes and procedures of the company. Section 214(c)(2)(B) of the Act.

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 against that of others. With respect to either special or advanced knowledge, the petitioner ordinarily must demonstrate that the beneficiary's knowledge is not commonly held throughout the particular industry and cannot be easily imparted from one person to another. 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 special or advanced, and that the beneficiary's position requires such knowledge.[2]

Once a petitioner articulates the nature of the claimed specialized knowledge, it is the weight and type of evidence which establishes whether or not the beneficiary actually possesses specialized knowledge. We cannot make a factual determination regarding a beneficiary's specialized knowledge if the petitioner does not, at a minimum, articulate with specificity the nature of its products and services or processes and procedures, the nature of the specific industry or field involved, and the nature of the beneficiary's knowledge. The petitioner should also describe how such knowledge is typically gained within the organization, and explain how and when the beneficiary gained such knowledge.

The petitioning organization in this matter specializes in gearbox engineering and field service solutions for industrial power services such as power plant generators, oil and gas industry, and

[1] The Petitioner does not claim that the Beneficiary was employed abroad in an executive or managerial capacity.

[2] Although some aspects of the "special" and "advanced" knowledge definitions may overlap, we will address each element individually.

"Wind-Turbin" drive systems. It provides mechanical engineering assistance in designing, sales, troubleshooting, and repairing/overhauling high speed gear boxes. The Petitioner adds that it is the exclusive North American agent for repair and gear engineering services and that its engineering services include design, field services and repair solutions for the support of and that the "company's design, engineering, and field service mechanical engineers are factory trained and authorized to provide expert and gear engineering services."

The Petitioner states that the Beneficiary has a bachelor's degree in mechanical engineering, interned in mechanical engineering for from June 2012 to December 2012, trained in-house at from February 2013 to April 2013, and began work for the foreign entity in 2014. Subsequently, the Beneficiary received a ' Training Certificate in October 2016.

A. Special Knowledge

Special knowledge concerns knowledge of the petitioning organization's products or services and its application in international markets. To establish that a beneficiary has special knowledge, the petitioner may meet its burden through evidence that the beneficiary has knowledge that is distinct or uncommon in comparison to the knowledge of other similarly employed workers in the particular industry.

The current statutory and regulatory definitions of "specialized knowledge" do not include a requirement that a beneficiary's knowledge be proprietary. Thus, whether the knowledge is proprietary or not, a petitioner must still establish that the knowledge utilized in the proposed position and possessed by the beneficiary is in fact specific to the petitioning organization, and somehow different from that possessed by similarly-employed personnel in the industry. In this matter, the Petitioner does not articulate how its engineering services are distinct or uncommon in comparison to other gearbox engineering and service solutions firms that specialize in particular systems. The Petitioner has not differentiated its internal tools and methodologies from other gearbox engineering firms in the industry. Rather, the petitioning organization uses third party technology and the technological training provided from these unrelated employers for its employees. Without a substantive explanation or evidence, the Petitioner has not established that the petitioning company's services are particularly complex or uncommon compared to similar engineering firms involved in gearbox design, repair, and maintenance. The Petitioner has not sufficiently articulated that the Beneficiary gained knowledge specific to only its organization. Moreover, the petitioning organization has not supported a claim that it would take a significant amount of time to train an experienced engineer to perform the duties required of its field engineering position.

The record lacks probative evidence demonstrating that extensive training is required to perform the duties of the foreign or proposed position. The petitioning organization does not explain how the Beneficiary's knowledge is different from that of other mechanical engineers who have attended

training in third-party technology or that training in the pertinent third-party technology is uncommon. Further, the record does not include evidence that mechanical engineers in this industry, without previous experience in the petitioning organization, would be unable to perform the duties of the petitioning organization's positions. While there likely are no employees with the exact same knowledge the Beneficiary possesses, the record does not demonstrate that the Beneficiary's knowledge is in fact significantly different from that generally held by professionals in the Petitioner's industry, or that it would require up to a full year or longer to acquire the knowledge needed for the position.

For the foregoing reasons, the record does not establish that the Beneficiary possesses special knowledge of the company's services and their application in international markets.

B. Advanced Knowledge

The Petitioner asserts that the Beneficiary's mechanical engineering degree, his internship with his training with and his Training certificate, exceeds the minimum educational requirement for its field engineers. This, however, is not the test to demonstrate that a Beneficiary has advanced knowledge of the petitioning organization's processes and procedures.

Because "advanced knowledge" concerns knowledge of an organization's processes and procedures, the Petitioner may meet its burden through evidence that the Beneficiary has knowledge of or an expertise in the organization's processes and procedures that is greatly developed or further along in progress, complexity, and understanding in comparison to other workers in the employer's operations. Such advanced knowledge must be supported by evidence setting that knowledge apart from the elementary or basic knowledge possessed by others.

To differentiate the Beneficiary's knowledge from other employees within the petitioning organization, we review the duties of those employees in similar positions, as well as their training, education, and length of experience with the petitioning organization's services. The Petitioner does not provide a list of the petitioning organization's field service engineers, their education levels, and work experience. The Petitioner does not describe how this Beneficiary's work and responsibilities differ from other field service engineers or how other employees gained their knowledge of the petitioning organization and its services. The Petitioner does not discuss the length of the Training, explain why its other field engineers are unable to complete this training, or identify how this training is specific to its processes and procedures. The Petitioner has not established that the Beneficiary's knowledge is advanced within the petitioning organization's own operations.

In sum, the record does not include sufficient evidence demonstrating that the Beneficiary's combination of professional experience, work assignments, and knowledge of the Petitioner's processes and procedures resulted in his possession of knowledge that is distinct or uncommon compared to similarly employed workers in the industry or others within the petitioning company or

that is greatly developed or further along in progress, complexity, and understanding in comparison to other workers in the employer's operations.

While the Beneficiary may be a valuable employee who is well-qualified for the proposed position in the United States, the record does not establish that the Beneficiary possesses special or advanced knowledge.

IV. EVIDENTIARY STANDARD AND RFE PROCEDURE

The Petitioner asserts that it has established eligibility for this visa classification with a preponderance of the evidence. We note that the Petitioner must establish that it meets each eligibility requirement of the benefit sought by a preponderance of the evidence. *Matter of Chawathe*, 25 I& N Dec. 369, 375-76 (AAO 2010). In other words, the Petitioner must show that what it claims is "more likely than not" or "probably" true. To determine whether the Petitioner has met its burden under the preponderance standard, we consider not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. *Id.* at 376; *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989). Here, the Petitioner has not established a qualifying relationship because the record does not include evidence that the Petitioner's members, or the members who hold a majority interest in the foreign entity, have agreed to vote their interests in concert. The Petitioner also has not established that the Beneficiary in this matter possesses specialized knowledge as that term is defined and interpreted by U.S. Citizenship and Immigration Services.

The Petitioner also claims that the Director did not issue an RFE that properly informed it of the type of evidence that was lacking in the record. Although the RFE may not have been as detailed as the Petitioner would have liked, it is the Petitioner's burden to establish eligibility for each element of the requested visa classification sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Further, a director is not required to issue a request for further information in every case, and even if the Director had committed a procedural error by not explicitly identifying specific evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The Petitioner has supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the Petitioner the opportunity to supplement the record with new evidence.

V. CONCLUSION

The appeal will be dismissed because the Petitioner has not established a qualifying relationship with the Beneficiary's foreign employer. We also find that the Petitioner has not established that the Beneficiary possesses specialized knowledge. As the evidence does not establish that the Beneficiary possesses specialized knowledge, we also cannot conclude that he has been employed abroad and would be employed in the United States in a specialized knowledge capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of F-G-G-* ID# 787767 (AAO Dec. 28, 2017)