U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF 5-USA CORP

DATE: DEC. 31, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, claiming to be an online gaming and software development company, seeks to continue the Beneficiary's employment as a brand/marketing manager 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 a managerial or executive capacity.

The Director of the Vermont Service Center revoked approval of the petition, concluding that the Petitioner did not establish, as required, that is been doing business and that it will employ the Beneficiary in a managerial or executive capacity.

On appeal, the Petitioner asserts that it will employ the Beneficiary in an executive capacity, contending that it has been doing business, despite not having provided goods or services to third parties. The Petitioner also argues that the Director placed undue emphasis on a site visit to the exclusion of "well-documented employment history" showing that the company is adequately staffed with employees who are capable of relieving the Beneficiary from having to perform primarily non-executive job duties.

Upon *de novo* review, we find that the Petitioner has not established that it is or has been doing business and we will therefore affirm the Director's conclusion on this issue. In contrast, we find that the Director did not provide an adequate analysis of the evidence to support her adverse conclusion regarding the Beneficiary's executive capacity in her proposed U.S. position. Therefore, despite the lack of sufficient evidence showing that the Beneficiary would be employed in an executive capacity, we will withdraw the Director's conclusion on this issue. Regardless, we will dismiss the appeal, as the Petitioner has not established that it is and has been doing business.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A 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 managerial or executive capacity. *Id.* The petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

Under U.S. Citizenship and Immigration Services (USCIS) regulations, the approval of an L-1A petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, a director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B).

II. DOING BUSINESS

The primary issue to be addressed in this decision is whether the Petitioner has been and is currently doing business. The regulations define a qualifying organization as one doing business as an employer in the United States. *See* 8 C.F.R. § 214.2(l)(1)(ii)(2). The term *doing business* is defined as the regular, systematic, and continuous provision of goods and/or services and does not include the mere presence of an agent or office. 8 C.F.R. § 214.2(l)(1)(ii)(H).

In support of the petition, the Petitioner provided its 2014 tax return, 2015 Form W-2s, quarterly tax returns for 2015 and the first quarter of 2016, and bank statements for January through December of 2015 and for January through April 2016.

In a notice of intent to revoke (NOIR), the Director informed the Petitioner that USCIS attempted, but was unable, to execute an administrative site visit in August 2018 and that as a result, it could not verify that the Petitioner is doing business. Therefore, the Petitioner was instructed to provide additional evidence to show that it is actively engaged in providing goods or services. In an effort to assist the Petitioner with the response, the Director provided with a list of acceptable documents that would establish whether an entity is doing business pursuant to the regulatory definition.

In response, the Petitioner provided its 2015 tax return, 2016 Form W-2s, quarterly tax returns for 2016 and the first quarter of 2017, an internally generated monthly report and general ledger for January 2017, bank statements from June 2016 to February 2017, utility bills, two confidentiality agreements listing the Petitioner as a party to a "Business Discussion," and a lease and photographs of the Petitioner's new office location.

The Director reviewed the Petitioner's response and determined that the submissions did not establish that the Petitioner has been and continues to do business. Aside from noting the observations made during the attempted site visit, the Director found that the Petitioner's tax returns and financial statements lack evidence of any gross receipts or sales. The Director further noted that the Petitioner's bank statements do not show regular deposits and are therefore insufficient to show that the Petitioner received payments in exchange for providing goods or services.

On appeal, the Petitioner disputes the Director's findings, asserting that its bank statements and lack of gross receipts in its tax returns "are not a valid basis to determine" that it has not been doing business. The Petitioner explains that its "main product is an online sports lottery service that is mainly developed and administered by its parent company as well as other companies under the [redacted] umbrella"; it claims that it carries out primarily marketing and investment activities "to establish brand recognition and user base, building partnerships with related U[.]S[.] tech companies, and expanding potential service offerings." In support of this claim, the Petitioner references *Matter of Leacheng*, 26 I&N Dec. 532 (AAO 2015), in which we found that being a party to contracts with unaffiliated entities is not a prerequisite for establishing that the petitioning entity is doing business.

We find, however, that the Petitioner has not adequately established that the facts of this petition are analogous to those in the published decision. In *Leacheng*, the petitioner provided evidence of a contractual agreement, which described the specific services it would provide and outlined the commission-based fee structure pursuant to which the foreign affiliate would compensate the petitioner in return for providing those services. *Id.* Unlike in *Leacheng*, the Petitioner in this matter has neither defined the specific services it claims to provide nor has it submitted documentation to corroborate that it is actually carrying out the broadly stated "marketing and investment" services on behalf of its related foreign entities. Although the Petitioner does not have to be a party to contracts with unaffiliated entities, it is reasonable to expect some evidence as to the types of activities in which the Petitioner engages in the U.S. market along with evidence showing that the Petitioner is being compensated for carrying out these activities. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). Providing evidence of incurred payroll expenses is not sufficient to establish that the Petitioner has been and would continue to be engaged in activities that are consistent with "doing business." Further, although the Petitioner provided two non-disclosure agreements in response to the NOIR, only one of those agreements lists the Petitioner as a party, while the other identifies [redacted] Limited, the Petitioner's foreign affiliate, rather than the Petitioner itself, as a party to the agreement. Regardless, neither agreement describes any services that the Petitioner would provide either to its foreign affiliate(s) or to a third party and therefore does not establish that the Petitioner was doing business.

Furthermore, the Petitioner's claim on appeal – that it does not generate revenue because it provides services to an affiliated entity – is inconsistent with the Beneficiary's job duty description in which the Petitioner made references to its "profit margins," "net profit," an "revenue/gross profit targets," all of which indicate that the Petitioner anticipated doing business that would result in generating some revenue. It is unclear why the Petitioner made these references in the Beneficiary's job description, but did not provide tax returns that are consistent with those references.

III. CONCLUSION

For the reasons discussed above, we find that the Petitioner is not a qualifying organization because it has not established that it has been doing and continues to do business. The revocation of the approval is therefore affirmed.

ORDER: The appeal is dismissed.

Cite as *Matter of 5-USA Corp*, ID# 1812553 (AAO Dec. 31, 2018)