U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF TPFS- INC.

DATE: JAN. 19, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an information technology service provider, seeks to temporarily employ the Beneficiary in the position of technical lead under the L-1B 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-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 California Service Center denied the petition concluding that the Petitioner did not establish, as required, that the Beneficiary (1) was employed abroad in a managerial, executive, or specialized knowledge capacity, or (2) would be employed in a specialized knowledge capacity. Additionally, the Director concluded that placement of the Beneficiary at the worksite of the unaffiliated employer is essentially an arrangement to provide labor for hire.

On appeal, the Petitioner disputes the denial, asserting that the Director misapplied the applicable law when she did not recognize the Beneficiary's specialized knowledge in the use of the Petitioner's proprietary software tool. The Petitioner argues that the Beneficiary was employed abroad and would be employed in the United States in a specialized knowledge capacity.

Upon *de novo* review, we find that the Petitioner did not overcome the Director's chief basis for the denial and will therefore dismiss the appeal. In addition, we find that the record lacks sufficient evidence of a qualifying relationship between the Petitioner and the Beneficiary's foreign employer. As the existence of a qualifying relationship is a fundamental element of eligibility and the Petitioner has not met its burden with respect to this threshold issue, the petition could not be approved even if the Petitioner had provided sufficient evidence to overcome the basis for the Director's decision.

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).

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 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).

II. BACKGROUND

The Petitioner is an 11-employee IT firm that provides software services to clients in the travel, hospitality, and credit card industries. The Petitioner explained that it uses software tools that have been developed in-house to analyze, design, and test software applications that are then implemented at client locations. The Petitioner identified as the proprietary software customization tool that is and will continue to be the focal point of the Beneficiary's employment abroad and her proposed position in the United States. The Petitioner further stated that the position requires a specialized knowledge of "both proprietary product and client infrastructure" to "help enable the customization of for the needs of its client, The Petitioner stated that has "licensed the rights to use the software suite."

The Petitioner describes the Beneficiary's proposed position as "almost identical" to her current position abroad where she is "involved in the architectural design, development and customization of solution for business infrastructure - The Development Life Cycle." The Petitioner described as a "software suite" that includes "a collection of sub-products that work together to form a comprehensive test management system." The Petitioner stated that the Beneficiary's position requires specialized knowledge of and indicated that a number of her duties are directly associated with her knowledge of the software tool, including assisting in the customization of reviewing the software requirements, using to develop applications that will best serve the client, providing training and support for the users of and monitoring and resolving issues related to The Petitioner provided a copy of the Beneficiary's résumé showing that she has worked with the client since August 2011 when she assumed her position as a "Tech Lead" with the foreign affiliate. While the résumé indicates that the Beneficiary is a professional with 15 Years of Experience" and lists as one of her "Technical Skill," it is not entirely consistent with the Beneficiary's list of duties, as it does not reference in the Beneficiary's list of responsibilities or indicate that this tool is significant to her position as the Tech Lead.

III. SPECIALIZED KNOWLEDGE

The first issue to be addressed is whether the Petitioner established that the Beneficiary possesses specialized knowledge and whether she has been employed abroad and will be employed in the United States in a specialized knowledge capacity. If the evidence is insufficient to establish that the Beneficiary possesses specialized knowledge, then we cannot conclude that she has been employed abroad in a specialized knowledge capacity.

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. A petitioner may establish eligibility by submitting evidence that the beneficiary and the proffered position satisfy either prong of the statutory definition.

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 given 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 individual beneficiary gained such knowledge.

In the denial decision, the Director determined that the Beneficiary's duties are the "same or similar" to others employed in the occupation of "Computer Systems Analyst" as described in the Department of Labor's *Occupational Outlook Handbook* (OOH). While the Director acknowledged the Petitioner's claims that the Beneficiary possesses knowledge of the Petitioner's products, tools, and processes, she determined that the Petitioner did not describe how the Beneficiary's claimed specialized knowledge is typically gained within the organization. The Director concluded that the Petitioner did not demonstrate that the Beneficiary's foreign and proposed positions require either special knowledge of the company's products that is uncommon in the industry and could not be easily transferred, or an advanced level of knowledge or expertise of the organization's processes and procedures.

On appeal, the Petitioner distinguishes the Beneficiary's positions abroad and in the United States from those of other technical leads, contending that the Beneficiary's positions, unlike those of other technical leads, require specialized knowledge. The Petitioner also claims that the Beneficiary "was part of the core team in India involved in [redacted] product development and maintenance" and deems the Beneficiary to be a "key employee" who has "been given specific assignments and trainings" within the foreign organization. The Petitioner states that the Beneficiary has specialized knowledge because she: (1) is 1 of only 12 employees within the U.S. and foreign organizations who possesses knowledge that is required to work with the [redacted] proprietary tool; and (2) "is one of the only employees" who has "extensive experience" working with their client, [redacted] In sum,

the Petitioner contends that the Beneficiary is "unique in her ability to utilize and customize[], design and implement the tool for the most effective use by [redacted]."

For the reasons explained below, we find that the Petitioner did not provide sufficient evidence to establish that the Beneficiary possesses specialized knowledge. Although the Beneficiary's résumé indicates that she has multiple years of experience in the IT industry and has been working with the Petitioner's proprietary tool since assuming her position with the foreign entity, the Petitioner has not established that the Beneficiary's knowledge is either special or advanced.

A. Special Knowledge

The Petitioner's primary claim is that the Beneficiary possesses special knowledge of its proprietary [redacted] product suite. The Petitioner claims that this knowledge was "attained in [*sic*] the job while employed at [redacted]." The Petitioner states that only someone with the Beneficiary's unique knowledge of both the proprietary product and the client's infrastructure can carry out her assigned duties, which could not be executed by someone outside the organization.

Determining whether a beneficiary has "special knowledge" requires review of a given beneficiary's knowledge of how the petitioning organization manufactures, produces, or develops its products, services, research, equipment, techniques, management, or other interests. Because "special knowledge" concerns knowledge of the petitioning organization's products or services and its application in international markets, a 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. Knowledge that is commonly held throughout a petitioner's industry or that can be easily imparted from one person to another is not considered specialized.

Here, the Petitioner relies heavily on the Beneficiary's ability to use a proprietary tool and apply it within the [redacted] infrastructure to meet that client's business needs. When asked to establish how the Beneficiary acquired special knowledge, the Petitioner responded by referring to the Beneficiary's master's degree in computer applications and emphasizing her employment history, which includes 15 years of IT experience and more than four years of experience in the "use and implementation of its software suite with the client [redacted] since August of 2011." We note that determining whether a beneficiary's knowledge is "special" requires a comparison of that knowledge to the knowledge of others who hold comparable positions in the Petitioner's industry. The Petitioner bears the burden of showing that the Beneficiary holds knowledge that is noteworthy or uncommon compared to her colleagues outside the organization. Despite claiming that the Beneficiary's duties are "at a much higher level" because her work involves developing and customizing the foreign entity's proprietary software, the Petitioner did not clarify how the Beneficiary's duties compared to those of other employees or explain how developing and customizing software within the context of the foreign entity is different from the work of other IT professionals at other organizations. Likewise, the Petitioner did not establish that the Beneficiary's educational credentials and years of experience outside the foreign organization are sufficient to

qualify the Beneficiary to perform duties that "are at a much higher level" such that they require the Beneficiary to possess knowledge that is uncommon in comparison to the knowledge of similar products held by other IT professionals within the industry.

According to the Petitioner, the Beneficiary has been serving in the position of technical lead since commencing her employment with the foreign affiliate in August of 2011. While the Beneficiary did not claim any prior experience with the foreign employer or with an affiliated entity, the Petitioner claims that the Beneficiary was selected for, and began employment in, the foreign position because she has knowledge of a proprietary product and experience working with the client. The Petitioner does not explain how the Beneficiary obtained such in-house knowledge prior to any experience with the company, nor does it explain how the Beneficiary received training that it alleges can only be acquired by in-house employees. According to the Petitioner, the Beneficiary commenced a specialized knowledge position with the foreign entity, even though she was not previously employed by that entity. It does not appear that she had prior exposure to or training in that entity's proprietary product, which is at the heart of the Petitioner's specialized knowledge claim. The Petitioner has not provided a credible explanation for claiming that the Beneficiary had "special knowledge" of its proprietary tool prior to commencing her employment with the foreign entity.

As the Petitioner acknowledged, the Beneficiary began performing the duties of her current position with the foreign employer on day one of her employment. Consequently, the Beneficiary could not have acquired "special knowledge" prior to commencing her position as technical lead, nor could such knowledge have been necessary if the Beneficiary was able to execute her assigned duties without prior experience or training in the foreign entity's proprietary software tool. The Petitioner's claim is severely undercut if the Beneficiary was able to fulfill the basic job requirements without having first completed the minimum time of on-the-job experience, as required by the Petitioner. The amount and type of training, work experience, and education required to develop the knowledge that is claimed to be "special" is one factor that may be used to determine whether a beneficiary possesses specialized knowledge. *See* 8 C.F.R. § 214.2(l)(3)(iv). The potential combination of training, work experience, and education is infinitely variable and there is no specific amount of time or type of training required to establish that the beneficiary possesses specialized knowledge. The petitioner, however, must submit consistent and credible evidence to establish eligibility. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Here, the Petitioner has not provided such evidence or outlined a specific path for gaining "special knowledge" of the foreign employer's software product. Instead, the Petitioner provided a statement in which it pointed to the Beneficiary's 15 years of experience and vaguely indicated that the Beneficiary "obtained the required education credentials," which included a Master of Computer Applications degree. The Petitioner did not establish a nexus between either of these factors and the "special knowledge" of the foreign entity's proprietary software tool the Beneficiary is claimed to have gained. The record also does not include evidence that the Beneficiary was promoted or assigned to a new position with the foreign employer at any time or that her duties have otherwise changed in nature or complexity. As discussed above, the record indicates that the Beneficiary

started performing her assigned duties as soon as her employment with the foreign entity commenced. As such, the Beneficiary could not have gained "special knowledge" of the foreign entity's proprietary product and its application within the [redacted] infrastructure *prior* to assuming her position as technical lead. While we acknowledge that the Petitioner now claims that the Beneficiary "was part of the core team in India involved in [redacted] product development and maintenance," the Petitioner does not point to any specific contributions the Beneficiary made to the product's development or explain why the Petitioner did not make this claim earlier. The record shows that the Petitioner's primary focus has been the Beneficiary's knowledge in the use and implementation of the proprietary product, rather than the creation or development of that product. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to U.S. Citizenship and Immigration Services (USCIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

The Petitioner also pointed out that the Beneficiary was one of "few of our employees" who was allowed "the opportunity to train on and gain experience with" the foreign entity's proprietary product. However, the record lacks evidence to show that any on-the-job or formal training was required or that the Beneficiary actually obtained such training in order to execute the assigned duties of her position. This lack of evidence is problematic for two reasons. First, it precludes us from being able to affirmatively verify the Petitioner's reference to "the opportunity to train" and second, it precludes an understanding of precisely how and when the Beneficiary gained the knowledge that is claimed to be "special." Further, the foreign entity's organizational chart shows that of the 12 employees who were claimed to have specialized knowledge of its proprietary product, five were trainees. The Petitioner did not clarify what was "special" about the knowledge possessed by the trainees or distinguish their "trainee" level of knowledge from the level of knowledge possessed by the Beneficiary. The Petitioner also did not establish how the 11 employees who were grouped with the Beneficiary acquired their knowledge of the foreign entity's proprietary software product. As noted above, the Petitioner did not establish a prescribed means for obtaining "special knowledge" of the proprietary [redacted] product through formal or on-the-job training. Thus, the claim that the Beneficiary's knowledge is exclusively held by a relatively small group of people is not, by itself, sufficient to establish that the knowledge qualifies as being "special," particularly when considered in light of the fact that the Beneficiary had no prior knowledge of the foreign entity or its proprietary software tool before commencing her position as its technical lead.

In sum, the Petitioner has not established that special knowledge is required to perform the Beneficiary's assigned duties, nor has the Petitioner established that her knowledge is distinct from that of others who are similarly employed within the IT industry and can be taught only through prior experience with the organization. The Petitioner has not established that the Beneficiary's educational credentials and employment history are uncommon in the IT industry or that either factor resulted in the Beneficiary's "special knowledge" of the foreign entity's proprietary software tool. Thus, the record does not establish that the Beneficiary's knowledge is distinct or uncommon within the industry. The Petitioner has not provided sufficient evidence to allow an understanding of what is special about the Beneficiary's knowledge or how she gained that knowledge. While the Beneficiary may be a valuable employee of the company and an experienced IT professional, the

record lacks sufficient evidence to establish that her knowledge is "special," as defined in the Act and regulations. The Petitioner submitted little evidence to set the Beneficiary's knowledge apart or to demonstrate that it is uncommon, noteworthy, or distinguished by some unusual quality. Due to these evidentiary deficiencies, the record does not establish that she possesses "special" knowledge.

B. Advanced Knowledge

The Petitioner has not established, in the alternative, that the Beneficiary possesses advanced knowledge.

Determinations concerning "advanced knowledge" require review of a beneficiary's knowledge of the petitioning organization's processes and procedures. A petitioner may meet its burden through evidence that a given beneficiary has knowledge of or 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. Also, as with special knowledge, the petitioner ordinarily must demonstrate that a beneficiary's knowledge is not commonly held throughout the particular industry and cannot be easily imparted from one person to another.

Here, the Petitioner has neither claimed nor documented that the Beneficiary has advanced knowledge of company-specific processes or procedures. Rather, its claims have been focused on the Beneficiary's knowledge of the company's products and services and industry-based comparisons. The Petitioner has not provided information that would allow us to compare the Beneficiary's knowledge of company processes and procedures to that of others within the petitioning company and its foreign subsidiary and therefore has not supported a claim that her knowledge is "advanced."[1]

IV. QUALIFYING RELATIONSHIP

In addition to the ground cited for denial in the Director's decision, the Petitioner has not established, as required, that it has a qualifying relationship with the Beneficiary's foreign employer.

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").

[1] Because the Petitioner has not demonstrated that the Beneficiary possesses special or advanced knowledge, we need not address whether the Beneficiary has been employed abroad in a position involving specialized knowledge or would be employed in the United States in a specialized knowledge capacity.

The Petitioner claims that it is an affiliate of [redacted] the Beneficiary's foreign employer. The term "affiliate" is defined in relevant part, as (1) one of two subsidiaries both of which are owned and controlled by the same parent or individual, or (2) one of two legal entities owned by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. 8 C.F.R. § 214.2(l)(1)(ii)(K).

In the present matter, the Petitioner provided stock certificates showing that its ownership is evenly split between two individuals – [redacted] and [redacted] – each owning 500 shares of the Petitioner's stock. The ownership scheme of the Beneficiary's employer is considerably different. In the L Classification Supplement to the petition the Petitioner indicated that [redacted] and [redacted] who own 100% of its stock, own 96% of the foreign entity's stock, claiming that the same two individuals *together* own the majority of the stock of both entities. As proof of the foreign entity's ownership, the Petitioner provided a document titled "Details of Allotment of Equity Shares," which indicates that [redacted] and [redacted] each owns 12,000 shares of that entity. However, the foreign entity's Memorandum of Association shows that the company issued a total of 25,000 shares of stock and that the remaining 1,000 shares was evenly divided among two other individuals, thereby giving [redacted] and [redacted] each 48% of the foreign entity's stock, rather than 50% as with their respective ownership shares of the Petitioner. Therefore, while [redacted] and [redacted] each maintain negative control of the Petitioner by virtue of their respective ownership of 50% of the Petitioner's stock, the same cannot be said of their respective ownership shares of the foreign entity where neither individual owns at least 50% of the company's stock.

USCIS does not accept a combination of individual shareholders as a single entity so that the group may claim majority ownership, unless the group members have been shown to be legally bound together as a unit within the company by voting agreements or proxies. Here, there is no evidence to show that [redacted] and [redacted] are bound together through voting agreements or proxies so that they meet the first part of the definition of "affiliate." The Petitioner also does not meet the second part of the definition, given that the U.S. petitioner has only two owners who control the entity, while the foreign entity has four owners where no one owner controls that entity.

In light of the above, the record does not establish that the Petitioner and the Beneficiary's foreign employer are commonly owned and controlled and therefore we cannot conclude that a qualifying affiliate relationship exists between these two entities. For this additional reason, the petition may not be approved.

V. VISA REFORM ACT

If a specialized knowledge beneficiary will be primarily stationed at the worksite of an unaffiliated employer, the statute mandates that the petitioner establish both: (1) that the beneficiary will be controlled and supervised principally by the petitioner, and (2) that the placement is related to the provision of a product or service for which specialized knowledge specific to the petitioning

employer is necessary. Section 214(c)(2)(F) of the Act. These two questions of fact must be established for the record by documentary evidence; neither the unsupported assertions of counsel nor the employer will suffice to establish eligibility. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). If the petitioner does not establish *both* of these elements, the beneficiary will be deemed ineligible for classification as an L-1B intracompany transferee.

Although the Director discussed the Beneficiary's placement at a client site, we need only evaluate the Beneficiary's worksite placement when the Petitioner has met its burden to establish that the Beneficiary will be employed in the United States in a specialized knowledge position. In this case, the Petitioner has not demonstrated that the Beneficiary will be employed in a specialized knowledge position or that a qualifying relationship exists between the Petitioner and the Beneficiary's foreign employer. As such, we will not make a finding with regard to the Beneficiary's worksite placement at this time. However, if the Petitioner were to overcome the issues cited above in the future, the Petitioner would then need to establish that the Beneficiary's employment and worksite placement were in compliance with the applicable law.

VI. CONCLUSION

For the reasons discussed above, the evidence submitted does not establish that the Beneficiary possesses knowledge that is either special or advanced. Because the Petitioner has not met this fundamental threshold, we need not address whether the Beneficiary has been employed abroad in a position involving specialized knowledge or would be employed in the United States in a specialized knowledge capacity. In addition, even if the Petitioner were able to overcome the original basis for denial, the Petitioner has not established that it has a qualifying relationship with the Beneficiary's employer abroad and on the basis of this additional finding this petition cannot be approved.

ORDER: The appeal is dismissed.

Cite as *Matter of TPFS- Inc.*, ID# 106839 (AAO Jan. 19, 2018)