U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 6981491

Date: JAN. 28, 2020

Appeal of California Service Center Decision

Form I-129, Petition for L-1A Manager or Executive

The Petitioner seeks to temporarily employ the Beneficiary as general manager of its new office[1] 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 California Service Center denied the petition and a subsequent motion, concluding that the record did not establish that (1) the Beneficiary had one continuous year of qualifying employment abroad during the three years preceding the filing of the petition; (2) the new office would be able to support a managerial or executive position within one year of approval of the petition; and (3) the Beneficiary has been employed abroad in a managerial or executive capacity.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification in a petition involving a new office, a qualifying organization must have employed the beneficiary in a managerial or executive capacity for one continuous year within three years preceding the beneficiary's application for admission into the United States. 8 C.F.R. § 214.2(l)(3)(v)(B). 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 submit evidence to demonstrate that the new office will be able to support a managerial or executive position within one year. This evidence must establish that the petitioner secured sufficient physical premises to house its operation and disclose the proposed nature and scope

[1] The term "new office" refers to an organization which has been doing business in the United States for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation no more than one year within the date of approval of the petition to support an executive or managerial position.

of the entity, its organizational structure, its financial goals, and the size of the U.S. investment. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

II. ONE YEAR OF CONTINUOUS EMPLOYMENT ABROAD

The Director found that the Beneficiary did not have the required minimum length of qualifying employment abroad. The regulations define the term "intracompany transferee" as:

> An alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge. Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement.

8 C.F.R. § 214.2(l)(1)(ii)(A).

The Petitioner filed the petition on February 26, 2018. The Petitioner must establish that the Beneficiary had one year of full-time continuous employment with a qualifying entity abroad during the three year period that preceded the filing of the petition.

On the petition, the Petitioner indicated that its foreign parent, [redacted] in [redacted] India, employed the Beneficiary from January 2011 to the present. In a request for evidence (RFE) dated September 25, 2018, the Director advised the Petitioner that government records indicate that the Beneficiary had been in the United States since 2015. She requested that the Petitioner submit copies of the Beneficiary's pay records, personnel records, training records, and/or correspondence from his foreign employer to establish his qualifying foreign employment. In response, the Petitioner stated that the Beneficiary "has been continuously employed and has received remuneration since 2013" from [redacted] in India.[2] It also submitted a payroll statement dated October 2018 from [redacted] in [redacted] Pakistan, indicating that the Beneficiary's "year of joining" was 2011 and that he was paid 5,650 in gross wages for 31 days of service that month as general manager.

The Director denied the petition, stating that USCIS systems show that the Beneficiary has been attending community college in the United States since January 2016 and that the Petitioner did not provide evidence to show how the Beneficiary was employed as a general manager in Pakistan in October 2018 while residing in the United States and attending college.

[2] We note that this conflicts with the Petitioner's representation on the petition that the Beneficiary had been employed by Take & Go Bakery since 2011. The Petitioner must resolve inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On motion, the Petitioner asserted that the Beneficiary has been the general manager for the foreign entity since 2011 where he has "been responsible for the management of the [redacted] operations." It stated that he "graduated with his BCom from the University of [redacted]" in India in 2015 and decided to continue his education in the United States. It stated that he entered the United States in July 2017 and that he "continued his employment by seeking investment opportunities for business acquisition, franchise or business development opportunities for his family." The Petitioner further stated that the Beneficiary "began attending college to study accounting and business management." It also submitted an affidavit from the Beneficiary's father regarding his employment with [redacted] and Indian Income Tax Return Verification Forms for the Beneficiary's father for assessment years 2016-17, and 2017-18.[3]

In her motion decision, the Director stated that the documents submitted on motion were insufficient to establish the Beneficiary's qualifying one year of employment abroad because USCIS records indicate that the Beneficiary was in the United States during the 2017-18 tax period in F-1 nonimmigrant student status. She also noted that his SEVIS record shows that he "is currently engaged in [redacted] since 04/04/2019" working for [redacted] in the United States.

On appeal, the Petitioner asserts that the Beneficiary has worked for the Petitioner's parent company since 2013; that he entered the United States to continue his education; and that he simultaneously served as an agent for the Petitioner's parent company, during which time he "researched and negotiated business sales opportunities, property locations, demographics, and reviewed market studies." It states that the Beneficiary prepared a "feasibility report and financial forecast and submitted them to his family." It further states that the Beneficiary's family "supported him financially while he was in the U.S." It asserts that the Beneficiary negotiated a lease agreement and filed the corporate organizational documents for the Petitioner on behalf of the Petitioner's parent company, and that he is eligible for the requested immigration benefit.[4]

We agree with the Director that the Petitioner has not established that the Beneficiary had one continuous year of qualifying employment abroad during the three years preceding the filing of the petition. The Petitioner did not submit credible evidence that the Beneficiary was employed by [redacted] in India.[5] The record contains no evidence that [redacted] paid the Beneficiary for any work in India or in the United States. The tax returns submitted on motion were the Beneficiary's father's tax returns and do not show any salary paid individually to the Beneficiary. Further, the payroll document dated October 2018 was issued by [redacted] in [redacted], Pakistan, and not the Petitioner's

[3] We note that the Petitioner also submitted a site evaluation prepared by [redacted] for a property located in Georgia. However, the lease in the record in for the Petitioner's proposed convenience store relates to property in Texas. It is not clear how the site evaluation submitted on motion relates to the Petitioner's business. We also note that the Petitioner's business plan states that its projected rent expense will be $13,000 per year, but the lease states that the rent will be $21,000 per year. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Matter of *Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

[4] On appeal, the Petitioner also cites a Memorandum from William R. Yates, Assoc. Dir. Ops., *Requests for Evidence (RFE) and Notices of Intent to Deny* (NOID) HQOPRD 70/2 (February 16, 2005). However, it does not provide a basis for the citation.

[5] The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

purported parent company, [redacted] in India.[6] Additionally, the affidavit from the Beneficiary's father is not independent, objective evidence of the Beneficiary's foreign employment. See *Matter of Ho*, 19 I&N Dec. 582, 591-92.

We also note that the Beneficiary previously applied for five nonimmigrant visas, four in 2014 and one in 2015. On each application, he indicated that he had never been previously employed and that he was currently a student in India. This information conflicts with the information provided by the Petitioner in the instant petition. The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Id.* Doubt cast on any aspect of a petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Next, even if the Petitioner had submitted evidence that the Beneficiary received wage payments from a qualifying foreign entity while he was in the United States, he cannot meet the one year foreign employment requirement simply by remaining on the foreign entity's payroll. The statute indicates that the relevant three-year period to be used as a reference point in determining whether the beneficiary had one year of continuous full-time employment with a qualifying entity abroad is the three years "preceding the time of his application for admission into the United States . . . ." Section 101(a)(15)(L) of the Act. The statute, however, is silent with regard to those beneficiaries who have already been admitted to the United States in a different nonimmigrant classification. The regulation at 8 C.F.R. § 214.2(l)(3) clearly requires that the petition be accompanied by evidence that the beneficiary has been employed for one continuous year in the three year period "preceding the filing of the petition" in an executive or managerial capacity.

A recent policy memorandum clarified the agency's policy that USCIS will use the date of filing of the initial L-1 petition as the reference point for determining the one year foreign employment requirement. USCIS Policy Memorandum PM-602-0167, *Satisfying the L-1 1-Year Foreign Employment Requirement; Revisions to Chapter 32.3 of the Adjudicator's Field Manual (AFM)* 4 (Nov. 15, 2018), https://www.uscis.gov/legal-resources/policy-memoranda ("*L-1 1-in-3 Policy Memo*"). USCIS will adjust that reference point only in those instances where the beneficiary entered the United States to work for a qualifying entity as a nonimmigrant in a work-authorized status (for example, H-1B or E-2 status).

However, "if a beneficiary was admitted as an F-1 nonimmigrant . . . , the time spent in F-1 nonimmigrant status will not result in an adjustment to the three-year period, because the purpose of admission was for study and not to work 'for' the qualifying organization." *Id.* And even if a qualifying organization financed the F-1 nonimmigrant's studies, the time spent in F-1 status does not result in an adjustment. *Id.* Therefore, "[an] F-1 student would be ineligible for L-1 classification if the last period of qualifying employment with the L-1 qualifying organization abroad was more than two years prior to the time of filing of the instant L-1 petition." *Id.* at n. 9.

The Petitioner, on whom the burden of proof rests, has not documented the length of the Beneficiary's trips to the United States in the three years preceding the filing of the petition on February 26, 2018.

[6] The Petitioner indicated in a letter submitted with the petition that it is affiliated with [redacted] in [redacted] India. However, it does not indicate that it is affiliated with a location in Pakistan where the Beneficiary purportedly worked.

USCIS records show that he was in the United States in F-1 nonimmigrant status from August 12, 2015, to May 24, 2016; from June 22, 2016, to July 3, 2017; and from July 28, 2017, onward. As the Beneficiary's stays during that time as an F-1 nonimmigrant were not "*for* a branch of the same employer or a parent, affiliate, or subsidiary thereof," we consider those periods of stay to be interruptive and we will not reach back to the three-year period preceding his first admission in F-1 status. Even if the foreign entity paid the Beneficiary while he was in the United States, such payments do not establish his continuous employment with the foreign entity. *Id.* at 4. Any such compensation is irrelevant for the purpose of establishing his continuous employment abroad, given that the Beneficiary was not physically present abroad for a continuous year nor was he working in the United States for a qualifying entity when he purportedly received such compensation. The Petitioner did not establish that the Beneficiary had at least one year of full-time continuous employment with a qualifying entity abroad in the three years preceding the filing of the initial L-1A petition. *See* 8 C.F.R. § 214.2(l)(3)(iii).

Beyond the Director's decision, we note that the petitioning entity's franchise tax status has been involuntarily ended in State of Texas. The Texas Comptroller of Public Accounts database lists the Petitioner's corporate status as "franchise tax status has been involuntarily ended" as of January 13, 2020. Texas Comptroller of Public Accounts, https://mycpa.cpa.state.tx.us/coa/coaSearchBtn (last visited January 13, 2020). This information indicates that the Petitioner's registration was ended as a result of a tax forfeiture or an administrative forfeiture by the Texas Secretary of State, and calls into question the Petitioner's intent to do business in the future. Any future submissions, whether relating to this case or another filing, must account for this information and demonstrate that it has been resolved.

We note this additional issue for informational purposes. Even without considering the company's status, the Beneficiary's length of qualifying employment abroad warrants dismissal of the appeal.

III. QUALIFYING RELATIONSHIP

While not previously addressed in the Director's decision, we find that the Petitioner has not provided sufficient evidence to establish 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").

On appeal, the Petitioner claims that it is the subsidiary of the Beneficiary's purported foreign employer, [redacted] in [redacted] India. The Petitioner asserts that [redacted] is solely owned by [redacted] The record contains stock certificates for the Petitioner showing that it is a corporation that is owned in equal shares by [redacted] and [redacted] However, the record also contains a partnership agreement indicating that the Petitioner is organized as a partnership with the Beneficiary and [redacted] as equal partners. Thus, the ownership and organization of the Petitioner is unclear. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

To establish a parent-subsidiary relationship (as claimed), the Petitioner would need to establish that [redacted] owns the Petitioner. *See* 8 C.F.R. § 214.2(l)(ii)(K). The Petitioner has not done so here. In the alternative, the Petitioner could establish that the two entities are affiliates by showing that the same individual owns and controls the Petitioner and the foreign entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L)(*1*). 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 (Comm'r 1982). Due to the discrepancies in the Petitioner's ownership detailed above, and absent documentary evidence such as voting proxies or agreements to vote in concert, the Petitioner has not established that the same individual, [redacted] controls both entities.[7] Thus, the companies are not affiliates as they are not owned and controlled by the same individual. Based on the evidence submitted, the Petitioner has not established that it has a qualifying relationship with the Beneficiary's foreign employer. For this additional reason, the petition cannot be approved.

IV. RESERVED ISSUES

The Director determined that the Petitioner did not establish that the new office would support a managerial or executive position within one year of approval of the petition, and that it did not establish that the Beneficiary has been employed abroad in a managerial or executive capacity. However, because the Beneficiary's length of qualifying employment abroad and the Petitioner's qualifying relationship with the Beneficiary's foreign employer are dispositive in this case, we need not reach the other two issues and therefore reserve them.

ORDER: The appeal is dismissed.

[7] 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. 593, 595 (Comm'r 1988). A petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the entity, and any other factor affecting control of the entity. *See Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362, 365 (Comm'r 1986). Proxy votes, if any, must be irrevocable from the time of filing the L-1 petition through adjudication to establish a qualifying relationship. USCIS Policy Memorandum PM-602-0155, L-1 Qualifying Relationships and Proxy Votes 4 (Dec. 29, 2017), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-12-29-PM-602-0155-L-1-Qualifying-Relationships-and-Proxy-Votes.pdf.