U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF F-A-E- INC.

DATE: SEPT. 6, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, describing itself as engaged in the "international trade of materials," seeks to temporarily employ the Beneficiary as its "Manager Director (2)" under the L-1A nonimmigrant classification for intracompany transferees. 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 on multiple grounds, concluding that the record did not establish, as required, that: (1) the Beneficiary's foreign employer was doing business as of the date the petition was filed; (2) the Petitioner was doing business; (3) the Beneficiary was employed in a managerial or executive capacity in his former capacity abroad; and (4) the Beneficiary would be employed in a managerial or executive capacity in the United States.

On appeal, the Petitioner asserts that the regulations indicate that it and the foreign employer are not required to do business as of the date the petition was filed. The Petitioner emphasizes that a qualifying organization can be one that "will be" doing business. Further, with respect to the Beneficiary's employment in a managerial or executive capacity abroad, and his proposed employment in the United States, the Petitioner states that: "given that the company is in its development stage, the function of an international business executive is essential."

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

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).

II. FOREIGN EMPLOYER DOING BUSINESS

The first issue we will analyze is whether the Petitioner established that the Beneficiary's foreign employer[1] was doing business as of the date the petition was filed.

The regulations indicate that the Petitioner must submit evidence to demonstrate that it maintains a qualifying relationship with the beneficiary's foreign employer; further, the regulations define qualifying organizations as those doing business "as an employer in the United States and in at least one other country." *See* 8 C.F.R. § 214.2(l)(1)(ii)(G) and 8 C.F.R. § 214.2(l)(14)(ii). "Doing business," is defined as the regular, systematic, and continuous provision of goods or services. 8 C.F.R. § 214.2(l)(14)(ii)(A) and 8 C.F.R. § 214.2(l)(1)(ii)(H).

In the Form I-129, the Petitioner indicated that it was engaged in the "international trade of minerals and [the] foundry of metals," but it otherwise provided little detail and supporting documentation related to the foreign employer's business operations abroad in support of the petition. Therefore, in a request for evidence [RFE], the Director requested that the Petitioner submit evidence to demonstrate that the Beneficiary's foreign employer was, and is, doing business; suggesting it provide probative evidence such as annual reports, tax documentation, audited financial statements, transactional documents, or contracts.

In response, the Petitioner stated that the owner of the foreign employer "is one of the holders of [a] mining license…granted by the National Mining Agency of the Republic of Colombia" and that he "is able to harness manganese ore to then market it nationally and globally." The Petitioner further asserted that this mining license had been "recently updated" and had a duration of 10 years. The Petitioner also submitted a copy of the mining license. In addition, the Petitioner provided a purchase order dated in December 2018 reflecting that the foreign employer had purchased approximately $52,000 of manganese dioxide ore from a vendor in Colombia. In addition, the Petitioner provided bills of lading and other documentation indicating the shipment of "used sample parts" in 2011.

In denying the petition, the Director stated that the Petitioner did not submit sufficient evidence to demonstrate that the foreign employer was doing business continuously as of the date of the petition was filed. The Director noted that most of the provided documentation was outdated and that the Petitioner had only provided one purchase order dated after the date the petition was filed.

On appeal, the Petitioner asserts that the foreign employer is not required to do business upon filing the petition stating that a qualifying organization is defined as a legal entity which is, "or will be," doing business. The Petitioner asserts that this "infers that there is a possibility for the business to be doing business in the future." It further contends that the "outdated invoices show that it is doing business in the past" and that the purchase order from December 2018 reflects that it "is and has the

[1] The Petitioner indicates that the Beneficiary was employed by the foreign employer from January 2015 to April 2018. The petitioner was filed on May 17, 2018.

potential (will be doing business)...continuously and systematically considering that the owner [of the foreign employer] has a current and valid mining license for the next 10 years."

The first issue we will address is the Petitioner's apparent contention on appeal that the Beneficiary's foreign employer need not be doing business according to the regulations as of the date the petition was filed. As noted, the Petitioner points to the definition of a qualifying organization and asserts that this references a legal entity that "is or *will be* [emphasis added] doing business." *See* 8 C.F.R. § 214.2(l)(1)(ii)(G)(*2*).

We disagree with the Petitioner's interpretation of the regulations. We acknowledge that the regulatory definition of a qualifying organization refers to a legal entity that is, or will be, doing business; however, we note that a qualifying organization can refer to both the foreign and U.S. employer sharing common ownership. Therefore, the "will be" referred to by the Petitioner in the definition of a qualifying organization is a reference to a "new office," or a U.S. based 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).

United States Citizenship and Immigration Service (USCIS) has indicated a "requirement [that a petitioner and its foreign entity] continue to do business in the U.S. and at least one other country for the duration of the L's stay." 52 Fed. Reg. 5741 (Feb. 26, 1987). Congress did not intend the L category to accommodate the complete relocation of foreign businesses to the United States, as throughout the legislative history of section 101(a)(15)(L), Congress refers to "international companies." *Id.* The final rule defining qualifying organizations states that a qualifying organization must be doing business "as an employer in the United States and in at least one other country." *See* 8 C.F.R. § 214.2(l)(1)(ii)(G). "Doing business," is defined as the regular, systematic, and continuous provision of goods or services. 8 C.F.R. § 214.2(l)(14)(ii)(A) and 8 C.F.R. § 214.2(l)(1)(ii)(H). As such, there is no basis in the regulations for the Petitioner's claim that the foreign employer could not be doing business as of the date of the petition was filed, or that it could be a qualifying organization doing business according to the regulations, based on the prospect of doing business.

The record in this matter is clear, the Petitioner appears to acknowledge that the foreign employer is not doing business as of the date the petition was filed and indicates it is still not doing business as of the date of the current appeal. Although the Petitioner appears to suggest that the foreign employer "is" doing business, it also only discussed the potential of the foreign employer doing business based on a mining license its owner holds and based on a purchase order dated after the date the petition. However, this does not demonstrate that the foreign employer is providing *goods or services* in a *regular, systematic, and continuous* [emphasis added] fashion as of the date the petition was filed. *See* 8 C.F.R. § 214.2(l)(14)(ii)(A) and 8 C.F.R. § 214.2(l)(1)(ii)(H). The Petitioner has submitted only one foreign employer purchase order dated after the time the petition was filed. However, this is not relevant to establishing that the foreign employer was doing business as of the date the petition was filed. We note that the Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

Further, the submitted foreign employer purchase order, even if sufficient to establish the continuous or regular provision of goods (which we find that it is not), only indicates the purchase of manganese ore on one occasion, not its sale; namely the provision of goods. Beyond this, the Petitioner only

provides three foreign entity transactional documents from 2011dating well before the date the petition was filed. In addition, the Petitioner did not submit, and still does not provide on appeal, the more probative evidence requested by the Director to demonstrate that the foreign employer was doing business as of the date the petition was filed, such as tax documentation, audited financial statements, contracts, or transactional documents dating from prior to the date the petition was filed.

As such, there is insufficient documentation to establish that the foreign company is actively engaged in the regular, systematic, and continuous provision of goods or services as an employer in the United States or in a foreign country. Therefore, we cannot conclude that the Petitioner has established that the foreign employer is a qualifying organization as required by the regulation at 8 C.F.R. section 214.2(l)(1)(ii)(G)(2).

III. PETITIONER DOING BUSINESS

We will next analyze whether the Petitioner was doing business as required by the regulations as of the date the petition was filed.[2]

On appeal, the Petitioner offers a similar contention specific to its operations as that asserted with respect to the foreign employer's; specifically, it points to the regulatory definition of a qualifying organization referring to a legal entity that "will be" doing business. It also emphasizes the prospect of it doing business based on a mining license held by the foreign employer. As we have noted, the regulations clearly provide the option to file a petition related to a newly intended U.S. based operation.[3] However, the Petitioner did not indicate in the L Classification Supplement to Form I-129 under Section 1, Item 12, or elsewhere on the record, that it was filing a new office petition. In fact, the Petitioner stated in Part 9, Item 3 of the Form I-129 that "the company already has a functioning office in the US." As such, the Petitioner is required to establish that it was doing business as of the date the petition was filed.

Again, "doing business," is defined as the regular, systematic, and continuous provision of goods or services. 8 C.F.R. § 214.2(l)(1)(ii)(H) (defining the term "doing business"). The mere presence of an agent or office of the qualifying organization will not suffice. *Id.* The Petitioner has not provided sufficient evidence to establish that it was doing business as of the date the petition was filed. First, based on its assertions on appeal, it appears that the Petitioner acknowledges that it was not doing business. Second, the Petitioner only submits one purchase order between it and the foreign employer dated in January 2019, approximately seven months after the date the petition was filed, reflecting the sale of $92,000 worth of manganese dioxide. Once again, as this invoice postdates the petition, it is not relevant to demonstrating that it was doing business as of the date the petition was filed. Beyond this, the Petitioner submits little evidence to establish that it was regularly, systematically, and continuously providing goods and services as of the date the petition was filed, such as tax documentation, audited financial statements, contracts, or transactional documents dated prior to the date the petition was filed.

[2] Because of the dispositive effect of the above finding of ineligibility; namely, our affirmation of the Director's conclusion that the Petitioner did not establish that the Beneficiary's foreign employer was doing business as of the date the petition was filed, we will only briefly address the remaining issues addressed by the Director.

[3] 8 C.F.R. § 214.2(l)(1)(ii)(F).

IV. REMAINING ISSUES

As we have discussed, the Director also denied the petition concluding that the Petitioner did not establish that the Beneficiary was employed in a managerial or executive capacity abroad or that he would be employed in a managerial or executive capacity in the United States.

In denying the petition on these grounds, the Director indicated that the Petitioner did not provide a sufficient description of the Beneficiary's foreign duties or his proposed duties in the United States. Further, the Director concluded that the Petitioner did not provide information related to the Beneficiary's subordinates abroad and submitted evidence indicating that its organizational chart in the United States was fully vacant. The Petitioner does little to address these apparent insufficiencies on appeal, stating only that "given that our company is in its development stage, the function of an international business executive is essential."

Upon review, the provided evidence does not sufficiently demonstrate that the Beneficiary would act in a managerial or executive capacity in the United States or that he acted in this capacity abroad.

With respect to the Beneficiary's foreign employment, the Petitioner only vaguely indicated that he designed, developed, and implemented "strategies," "his management was directed towards foreign communications and business relations," he was responsible for "commercial outreach" and "market research," and he "led various potential business agreements." This foreign duty description is generic and the Petitioner submitted little documentation to substantiate the Beneficiary's daily qualifying managerial and executive level tasks abroad. The provided foreign duties could apply to any manager or executive acting in any industry and they provide little insight into his actual day-to-day managerial or executive tasks abroad. For instance, the Petitioner did not sufficiently detail or document strategies the Beneficiary implemented, foreign communications or business relations he managed, commercial outreach he conducted, or business agreements he led. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, the Petitioner only provided a brief duty description of the Beneficiary's proposed U.S. managerial or executive role reflecting he would likely be primarily engaged in non-qualifying operational duties. For instance, the U.S. duty description indicated that the Beneficiary would be tasked with purchasing "electrical, electronical [*sic*] equipment and other related products to ship to the U.S. to our company's facility located in Colombia" and that he would act "as our translator and interpreter for foreign customers." Not only is this duty description overly brief and vague, it appears to reflect that the Beneficiary would likely be exclusively devoted to non-qualifying operational duties under an approved petition. 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. *See, e.g.*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Even though the Beneficiary holds a senior position within the Petitioner or foreign employer, the fact that he will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44)(A) and (B) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial or executive in nature. *Id.* The Beneficiary may exercise discretion over the Petitioner's or foreign employer's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making; however, the position descriptions alone are insufficient to establish that his actual duties would be primarily managerial or executive in nature.

Again, the Petitioner has submitted little documentation to substantiate its, or the foreign employer's, staffing levels. In fact, the Petitioner provided an organizational chart reflecting several positions, all of which were vacant. Indeed, this makes sense in light of the fact that the Petitioner did not demonstrate that it is doing business as of the date the petition was filed. As such, the Petitioner did not demonstrate that it has staff to relieve the Beneficiary from primarily performing the non-qualifying operational tasks listed in his U.S. duty description. With respect to the foreign employer's staffing, the Petitioner provided an organizational chart; however, it did not provide the names, duty descriptions, education levels, and salaries for each of these asserted positons, as requested by the Director. Further, it submitted no supporting documentation to substantiate these employees abroad. Therefore, the Petitioner did not provide adequate evidence to demonstrate that the foreign employer was sufficiently developed or staffed to support the Beneficiary in a managerial or executive capacity. In fact, as discussed, the Petitioner appears to acknowledge that the foreign employer was, and is, not doing business, leaving substantial question as to whether it was sufficiently operational to support the Beneficiary in a managerial or executive capacity.

For the foregoing reasons, the Petitioner did not establish that the Beneficiary was employed in a managerial or executive capacity abroad or that he would be employed in a managerial or executive capacity in the United States.

V. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of F-A-E- Inc.*, ID# 5213490 (AAO Sept. 6, 2019)