U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24217215

Date: FEB. 9, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a Chinese language education operation, seeks to continue employing the Beneficiary temporarily as its president 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 Texas Service Center denied the petition, concluding that the Petitioner did not establish that the foreign entity exists and has been doing business, the Beneficiary was employed abroad in a managerial or executive capacity, and the Beneficiary is qualified to perform the intended services in the United States. The Director also entered as separate finding of "fraud or willful misrepresentation of a material fact," noting that this finding was based on information discovered during overseas site visits of the related foreign entity that took place in 2018 and 2020. The matter is now before us on appeal.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will remand the matter to the Director for further consideration and entry of a new decision.

I. LAW

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.*

II. FRAUD OR WILLFUL MISREPRESENTATION OF MATERIAL FACTS

First, we will address the Director's finding of "fraud or willful misrepresentation of a material fact." To make a finding of willful misrepresentation of a material fact in visa petition proceedings, an immigration officer must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975).

As outlined by the Board of Immigration Appeals, a material misrepresentation requires that one willfully makes a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. at 289-90. The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Tijam*, 22 I&N Dec. 408, 425 (BIA 1998); *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980). To make a fraud finding, the false representation must have been made with the intent to deceive a U.S. government official authorized to act upon the request and the U.S. government official believed and acted upon the false representation by granting the benefit. 8 *USCIS Policy Manual* J.2(C), https://www.uscis.gov/policy-manual/volume-8-part-j-chapter-2.

Here, the denial is based, in part, on a finding of "fraud or willful misrepresentation." However, this finding is ambiguous as it does not separate the elements of fraud and willful misrepresentation, nor did the Director apply these elements to the factors that contributed to the finding. The decision does not clearly state whether the finding amounts to fraud or willful misrepresentation, nor does it clearly identify the subject of the finding, and thus it is unclear whether the finding was intended to apply to the Petitioner, the Beneficiary, or both. In light of these deficiencies, we can neither affirm nor conclusively withdraw the Director's finding of "fraud or willful misrepresentation."

Further, the Director's finding of "fraud or willful misrepresentation" stems from information gathered during overseas site visits conducted in May 2018 and October 2020, which together led the Director to conclude that the record contains contradictions about the Beneficiary's employment with the Petitioner's foreign parent entity and led to questions regarding that entity's existence as a valid enterprise that continues to do business abroad.[1] On appeal the Petitioner addresses these issues in a legal brief and submits additional evidence for consideration.

[1] An entity can be deemed as "doing business" if it regularly, systematically, and continuously provides goods and/or services. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H).

III. GROUNDS FOR DENIAL

A. Existence of the Foreign Entity

First, we will address the issue of the foreign entity's existence at the time of filing this petition. The Director determined that the record contains inconsistent information about the date the foreign entity was established. The Director observed that the Petitioner provided documents showing that the foreign entity was established in 2009 and determined that this information is inconsistent with "other documentation" which indicates that the Beneficiary has been working for the foreign entity since 2006. The Director relied on this anomaly and findings from the 2020 site visit as grounds for questioning whether the foreign entity existed in 2019, when this petition was filed.

On appeal, the Petitioner explains that in 2006 the Beneficiary started working for [redacted] Center, which used the trade name [redacted] Education. The Petitioner states that after going through what it describes as a "restructuring process," the foreign entity was formed and registered in 2009 under the name [redacted] Education; the Petitioner states that the newly formed entity continued to use [redacted] Education as its trade name, thereby explaining the Beneficiary's claim that she was employed by [redacted] Education prior to the 2009 formation of the Petitioner's foreign parent entity. The Petitioner points out that this information is not new, as it was contained in a 2014 business plan, which was originally submitted in support of two prior L-1A petitions and has been resubmitted in support of this appeal. It is worth noting that the business plan predates the notice of intent to deny (NOID) in this matter, which suggests that the foreign entity's use of the trade name [redacted] Education was disclosed earlier and, without further information, is not a sufficient basis for questioning the foreign entity's formation and existence at the time this latest extension petition was filed.

Next, concerning the foreign entity's business premises, the Petitioner states that it had been using the same business address from May 2016 through the time both site visits were conducted; the Petitioner therefore disputes the finding that the foreign entity was not operating at its designated business address. On appeal, the Petitioner submits copies of various government documents to show that the foreign entity was registered to the address in question.[2] Further, the Petitioner articulates valid concerns about the Director's reliance on information gathered during the 2020 overseas site visit. First, the Petitioner highlights the time period of the site visit, pointing out that it was conducted "at the height of" the COVID pandemic when businesses in China were subject to broad government shutdowns. The Petitioner also questions the evidentiary weight of the information gathered by the investigating officer at the 2020 site visit, noting that although the officer spoke with an employee of the business located in the suite opposite the foreign entity, no background information was disclosed about that business, such as the name of the business or the date that entity moved into the building. The Petitioner also challenges the evidentiary weight of information provided by a [redacted] who was interviewed during the 2020 overseas site visit based on his capacity as the building's deputy manager where the business address in question is located. The Petitioner contends that the specific

[2] Although the Petitioner also points to a translated lease agreement, which was provided in response to the NOID and which the Director mentioned in the denial, this document was not accompanied by a translator's certification attesting to the translation's completeness and accuracy and therefore we cannot meaningfully determine whether the translated material supports the Petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3).

unit the foreign entity was renting is owned by an individual –[redacted]– and[redacted] in his capacity as a manager of the building management company, "could not have the most up to date and accurate information about tenants in a given unit in the building."

B. Doing Business

In addition to the information gathered at the 2020 site visit, the Director questioned whether the foreign entity, whose business was to provide training and educational consulting services to its clients, continued to do business after July 2019, when its business ties with the U.S. Embassy, one of the foreign entity's clients, were severed. The Director also noted the following observations: (1) the foreign entity's business license, which appears to be dated February 2014, lists a different business address from the one that was the subject of the 2020 site visit; (2) the foreign entity's organizational chart appeared "incomplete" because it did not list teachers who would provide the language services offered by the foreign entity; and (3) the Petitioner "did not provide pay statements for any employees other than department heads and the general manager." However, the Director did not establish a clear nexus between these observations and the conclusion that the foreign entity was not doing business.

Further, despite the Petitioner responding ambiguously when questioned about its severed relationship with the U.S. Embassy, the record does not support the Director's conclusion that the foreign entity stopped doing business once it's business relationship with the U.S. Embassy was discontinued. In fact, the Petitioner's NOID response includes business invoices from July through September 2019, as well as receipts showing that the foreign entity received tuition payments from clients in August and September 2019. Because the Director did not discuss the invoices or payment receipts in the denial, it is unclear whether these documents factored into the Director's determination that the foreign entity stopped doing business once its business relationship with the U.S. Embassy ended.[3] Further, on appeal the Petitioner offers new evidence, including a student client list from 2021, a May 2021 business service agreement between the foreign entity and another party, a May 2021 electronic bank receipt showing a rent payment made by the foreign entity, and a June 2021 invoice for rent listing the foreign entity as "purchaser." We note, however, that the record lacks evidence showing that the foreign entity was doing business in 2020. The Director must consider all relevant documents prior to making a determination as to whether the foreign entity has been continuously doing business since July 2019, when this petition was filed. *See* 8 C.F.R. § 103.2(b) (requiring a petitioner to establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through the issuance of the final decision). The Director may wish to consider issuing a request for evidence (RFE) or NOID in order to make a final determination on this issue.

C. Beneficiary's Employment Abroad

Regarding the issue of the Beneficiary's employment abroad, the Petitioner initially claimed that the Beneficiary was employed in an executive capacity, but later altered that claim in the NOID response, claiming that the Beneficiary's job duties "fall in accordance with definitions of a position with managerial capacity." In the denial, the Director determined that the Petitioner did not provide

[3] The denial includes a list of documents that the Petitioner provided in response to the NOID. Although the business invoices were included in that list of submitted documents, the tuition payment receipts were not. It is therefore unclear whether the Director was aware of the Petitioner's submission of the tuition payment receipts.

evidence of the Beneficiary's authority to make personnel decisions and therefore did not establish managerial capacity. The Director also noted that although the Beneficiary's job duty breakdown was included in a NOID response statement from counsel, information about her job duties was not included in a letter from the foreign entity's general manager. We note, however, that the job description in counsel's letter is merely a duplicate of the job description that was originally contained in the Petitioner's supporting statement. This statement was submitted at the time the petition was filed and specifically included interviewing and hiring teachers among the Beneficiary's list of duties.

Further, although the Director highlights the absence of the Beneficiary's name from the list of employees who were included in a previously submitted foreign organizational chart, this observation overlooks that the organizational chart is current and is intended to show the foreign entity's staffing at a time when the Beneficiary was no longer working abroad, but rather working in the United States.

Lastly, in a discussion of the Beneficiary's job duties, the Director ambiguously determined that while "[m]any of these duties may be managerial in nature," the Petitioner did not establish that "these, or other duties are, in fact qualifying duties . . . that are primarily managerial in nature." This determination makes two seemingly competing conclusions as to whether or not the Beneficiary's job duties are managerial. However, because the Petitioner subsequently claimed that the Beneficiary was employed in an executive capacity, the basis of the Petitioner's claim is ultimately unclear as to whether the Beneficiary would be employed in an executive or managerial capacity.[4] Notwithstanding the material change the Petitioner made regarding the Beneficiary's foreign employment, the Director did not properly review the evidence and explain the how the record was deficient regarding the Beneficiary employment abroad. *See* 8 C.F.R. § 103.3(a)(1)(i) (requiring that a petitioner be provided with a written explanation of the specific reasons for denial).

IV. BASIS FOR REMAND

Notwithstanding the above noted deficiencies in the Director's decision, the record lacks sufficient reliable evidence establishing that the Beneficiary's foreign and proposed employment has been and would be in a managerial or executive capacity.

Regarding the Beneficiary's employment abroad, the Petitioner submitted a job duty breakdown that includes multiple operational duties in several of the five listed job categories. Although the job description indicates that the Beneficiary had discretionary authority and worked autonomously, it is unclear that she established goals and policies of the organization or directed the management of the organization, as would be required of someone employed in an executive capacity. *See id.* That said, although the Petitioner originally claimed that the Beneficiary's employment abroad was in an executive capacity, it altered that claim in response to the NOID, stating that the Beneficiary was employed in a managerial capacity. The Petitioner must resolve this inconsistency with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

[4] We note that because this is an extension petition, it is expected that the Petitioner's claims regarding the Beneficiary's foreign employment to be consistent with prior filings. The Director may wish to request information to confirm this.

Regarding the Beneficiary's proposed U.S. employment, the Petitioner provided two job duty breakdowns that contain inconsistent information about the duties and percentage of time assigned to each duty. The job duty breakdown included in the Petitioner's cover letter states that the Beneficiary will "[d]evelop the management system for multiple locations" and "[b]e in charge of the operation." Neither of these duties is included in the separate job description provided by the foreign entity's general manager. Further, while the cover letter states that 10% of the Beneficiary's time would be allocated to hiring staff, the foreign entity's general manager stated that 15% of the Beneficiary's time would be allocated to this duty. Likewise, the two job descriptions list inconsistent percentages of time to the Beneficiary's role in business development; the cover letter shows 5% of the Beneficiary's time being devoted to this duty, while the general manager's letter assigns 20% to the same duty. As noted above, inconsistencies such as these must be resolved with independent, objective evidence pointing to where the truth lies. *Id.* Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.* Further, despite the fact that the Beneficiary had been employed by the U.S. entity since 2014, the job descriptions lack sufficient detail about the duties to be performed in the course of the Petitioner's daily operations to determine if they are truly managerial or executive. Reciting a beneficiary's vague job responsibilities is not sufficient; the regulations require a detailed description of the job duties to be performed. 8 C.F.R. § 214.2(l)(3)(ii).

In addition, the Petitioner's latest quarterly tax return on record, which has been submitted on appeal, shows that as of the 2021 second quarter, the Petitioner was operating with a seven-person staff, which is nearly a 65% staffing reduction as compared to the 19 employees the Petitioner claimed at the time of filing. A determination of the Beneficiary's eligibility hinges on a comprehensive analysis of the proposed job duties and the organizational hierarchy within which those duties would be performed. In the matter at hand, the record lacks a sufficient job description and indicates that the Beneficiary would be working within the scope of a significantly diminished personnel structure which would likely alter the Beneficiary's job duties and detract from the Petitioner's ability to relieve the Beneficiary from having to perform primarily operational tasks in the daily course of business. 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).

We also note that although English language translations were provided for the foreign documents in the record, the foreign entity's meeting minutes from 2017, the foreign entity's January 2018 leasing contract, and the foreign entity's development project contract were not accompanied by a translator's certification attesting to the completeness and accuracy of the translations. *See* 8 C.F.R. § 103.2(b)(3). We therefore cannot meaningfully determine whether the translated material is accurate and thus supports the Petitioner's claims.

V. DEFERENCE

Lastly, in matters involving an extension request to a previously approved petition, U.S. Citizenship and Immigration Services (USCIS), where appropriate, defers to its prior decision when the extension request is filed by the same parties and for the same position in the same nonimmigrant classification. 2 *USCIS Policy Manual* A.4(B)(1), https://www.uscis.gov/policymanual; *see also* USCIS Policy

Alert, PA-2021-05, *Deference to Prior Determinations of Eligibility in Requests for Extensions of Petition Validity* (Apr. 27, 2021), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210427-Deference.pdf.

Although the matter at hand involves an extension request that was filed by the same Petitioner on behalf of the same Beneficiary, the record contains new information, including the Petitioner's diminished staffing and the Petitioner's altered claim regarding the Beneficiary's proposed employment from managerial capacity to executive capacity. The new information indicates a change in circumstances that may alter the Beneficiary's job duties and nature of her proposed position. We further note that USCIS is not bound to approve subsequent petitions where eligibility has not been demonstrated strictly because of a prior approval. *Id.*

VI. CONCLUSION

Accordingly, although we cannot presently affirm the Director's ambiguous finding of "fraud or willful misrepresentation" as the record is currently constituted, the record contains evidentiary deficiencies that must be further addressed. The Director may wish to issue and RFE or NOID, as appropriate, to further address eligibility issues related to any of the foregoing. Any assertions of fraud or willful misrepresentation should clearly outline which finding the Director seeks to make and whether that finding will be made against the Petitioner, the Beneficiary, or both parties.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.