U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF F-USA LLC

DATE: NOV. 17, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, which sells soaps and air fresheners, seeks to permanently employ the Beneficiary as its president and chief executive officer under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director, Texas Service Center, denied the petition, concluding that the evidence of record did not establish that: (1) the Beneficiary has been employed abroad in a managerial or executive capacity; (2) the Beneficiary will be employed in the United States in a managerial or executive capacity; (3) the Petitioner has been doing business for at least one year prior to the petition's filing date; and (4) the Petitioner has the ability to pay the Beneficiary's proffered wage. The Petitioner filed a motion to reopen and a motion to reconsider the Director's decision. The Director found that the motions did not meet the applicable requirements, and did not disturb the earlier decision.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred by not considering the evidence and arguments submitted on motion.

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

I. MOTIONS TO REOPEN AND RECONSIDER

The decision that the Petitioner appealed to us is not the denial of the petition, but rather the Director's subsequent finding that the Petitioner's motion did not meet the requirements of either a motion to reopen or a motion to reconsider. We will address the merits of the underlying petition only if the Petitioner has established that it filed a qualifying motion.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services policy. A motion to reconsider a decision on an application or

petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

On motion, the Petitioner submitted copies of documents including tax records, correspondence between the Petitioner and prospective clients, and résumés for the Beneficiary's subordinate employees. The Petitioner had submitted some of these materials previously, but others, such as the Petitioner's 2014 IRS Form 1120, U.S. Corporation Income Tax Return, appeared for the first time on motion. The tax return is directly material to the Petitioner's ability to pay the Beneficiary's salary, which was one of the stated grounds for denial.

The Director did not discuss the merits of the evidence submitted on motion, stating instead that the evidence is not truly new and therefore does not satisfy the requirements of a motion to reopen. On appeal, the Petitioner asserts that the evidence is relevant to the grounds for denial, and should have received consideration.

The Petitioner's response to an earlier request for evidence (RFE) did not include required evidence that the Director had requested. The Director properly denied the petition on that basis. *See* 8 C.F.R. § 103.2(b)(14). Nevertheless, the purpose of a motion to reopen is not to allege error in the prior decision, but rather to introduce new evidence that is material to the grounds for denial. The Petitioner did submit relevant new evidence, which the Director should have considered on motion. Because the Director did not consider this evidence, we will examine the merits of the underlying petition, taking into account the evidence that the Petitioner submitted on motion.

With respect to the Petitioner's motion to reconsider, the Petitioner alleged errors of fact and cited errors of law, noting, for instance, that the Director had cited a Department of Labor regulation that does not apply to this proceeding. Nevertheless, as noted above, a motion to reconsider must establish that the initial decision was in error. As we will discuss below, we find that the Director properly denied the petition, and therefore we find that the Director properly denied the motion to reconsider.

We discuss the merits of the petition below.

II. LEGAL FRAMEWORK

Section 203(b) of the Act states in pertinent part:

> (1) Priority Workers. – Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> . . . .
>
> (C) *Certain multinational executives and managers.* An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's

> application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file Form I-140, Immigrant Petition for Alien Worker, to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager. A labor certification is not required for this classification.

The regulation at 8 C.F.R. § 204.5(j)(3) states:

> (3) Initial evidence—
>
> (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:
>
> (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
>
> (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
>
> (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
>
> (D) The prospective United States employer has been doing business for at least one year.

III. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based, in part, on a finding that the Petitioner did not establish that: (1) the Beneficiary was employed abroad in a managerial or executive capacity; and (2) the Petitioner will employ the Beneficiary in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as "an assignment within an organization in which the employee primarily":

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as "an assignment within an organization in which the employee primarily":

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

If we use staffing levels as a factor in determining whether an individual is acting in a managerial or executive capacity, we must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

A. Foreign Employment in a Managerial or Executive Capacity

If the Beneficiary is already in the United States working for the foreign employer or its subsidiary or affiliate, then the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) requires the Petitioner to submit a statement from an authorized official of the petitioning United States employer which demonstrates that, in the three years preceding entry as a nonimmigrant, the Beneficiary was employed by the entity abroad for at least one year in a managerial or executive capacity.

The Petitioner filed Form I-140 on December 31, 2014. The Petitioner identified the Beneficiary's foreign employer as [redacted] which is the petitioning company's sole shareholder. The Petitioner indicated that the Beneficiary was the foreign company's director and 100% owner.

A discussion of the submitted evidence regarding the Beneficiary's duties is secondary to a preliminary determination of whether the Petitioner meets the more basic statutory criteria discussed at section 203(b)(1)(C) of the Act, which states that only aliens who were "employed" abroad and are coming to the United States "to continue to render services to the same employer or to an affiliate or subsidiary thereof" will merit classification as a multinational manager or executive. Also, section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), only permits an "employer desiring and intending to employ within the United States an alien" to file an immigrant petition seeking classification under section 203(b)(1)(C) of the Act. This is in contrast to provisions in the Act, such as section 204(a)(1)(E) and (H), which permit the alien to file an immigrant petition on behalf of himself or herself.[1]

Further, the terms "executive capacity" and "managerial capacity," which have been codified and incorporated into the regulations at 8 C.F.R. § 204.5(j)(2), specifically apply solely to "the employee" of the "United States employer" filing the petition on behalf of a beneficiary. *See* section 101(a)(44)(B) of the Act; 8 C.F.R. § 204.5(j)(1), (2). Only upon establishing that the Petitioner is the employer and the Beneficiary is the employee would there be a need to conduct a further analysis of the given facts within the framework of the four-prong definition of managerial or executive capacity. If we determine that an employer-employee relationship does not exist between the Petitioner and the Beneficiary, this deficiency, by itself, would serve as a sufficient basis for denying the petition. Therefore, we must make a determination on this point.

As indicated above, section 203(b)(1)(C) of the Act requires a given beneficiary to have been "employed" abroad and to be coming to the United States for the purpose of rendering services to the same or a related "employer" in the United States in a managerial or executive capacity.[2]

[1] Of particular note, Congress enacted sections 203(b)(5) and 204(a)(1)(H) of the Act to permit an alien entrepreneur "engaging in a new commercial enterprise" to immigrate to the United States provided certain requirements were met, including employment creation.

[2] We note there is existing precedent case law, namely *Matter of Allen Gee, Inc.*, 17 I&N Dec. 296 (Comm'r 1979), and *Matter of Aphrodite*, 17 I&N Dec. 530 (Reg'l Comm'r 1980), that is relevant to the issue discussed here in this matter. In *Allen Gee, Inc.*, the Regional Commissioner determined that, as the petitioning corporation "is a legal entity distinct from its sole stockholder," it may "petition for the beneficiary's services." *Allen Gee, Inc.*, 17 I&N Dec. 297, 298.

Section 101(a)(44) of the Act defines both managerial and executive capacity as an assignment within an organization in which an "employee" performs certain enumerated qualifying duties. The Supreme Court has determined that where the applicable federal law does not define "employee," the term should be construed as "intend[ing] to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) ("*Darden*") (quoting *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989) ("*C.C.N.V.*")).

The Court stated:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-324 (quoting *C.C.N.V.*, 490 U.S. at 751-752); *see also Clackamas Gastroenterology Assocs. P.C. v. Wells*, 538 U.S. 440, 445, 447 & n.5 (2003).

In *Clackamas*, the Supreme Court articulated the following factors to be weighed in determining whether an individual with an ownership interest is an employee:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.
- Whether and, if so, to what extent the organization supervises the individual's work.
- Whether the individual reports to someone higher in the organization.

Similarly, in *Aphrodite*, 17 I&N Dec. at 531, the Commissioner focused on the corporation's separate legal existence from that of its shareholder and pointed out that the term "employee" was not used in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L).

However, both decisions were issued prior to the Immigration Act of 1990 ("IMMACT90"), which codified the definitions for managerial and executive capacity. *See* Pub. L. No. 101-649, § 123, 104 Stat. 4978, § 123 (1990). It is critical to note that both definitions in the Act now incorporate the term "employee" in referring to the beneficiary as one who assumes an assignment with an organization in a managerial or executive capacity. *Id.*; section 101(a)(44) of the Act. Therefore, while the holdings in *Allen Gee, Inc.* and *Aphrodite* were in line with the statutory provisions then in effect, we must consider the changes that resulted from the enactment of IMMACT90 and their effect on our current contemplation of the term "employee" within the scope of an employer-employee relationship between the Petitioner and the Beneficiary.

- Whether and, if so, to what extent the individual is able to influence the organization.
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
- Whether the individual shares in the profits, losses, and liabilities of the organization.[3]

We must consider all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee relationship. *Id.* at 448-49.

Applying the factors in *Darden* and *Clackamas* to the evidence in this matter, we find that the Petitioner has not established that the foreign entity "employed" the Beneficiary, or that the Petitioner will be a "United States employer" having an employer-employee relationship with the Beneficiary as an "employee" who was or would be employed in a managerial or executive capacity. Throughout this proceeding, including on appeal, the Petitioner has maintained that the Beneficiary is the sole owner of the foreign company, which is the sole owner of the petitioning entity, and that the Beneficiary has total control and decision-making authority over both businesses.

The record supports the finding that the Beneficiary both owns and controls the Petitioner's foreign parent company, holding a role as the company's top-most official and not subordinate to or controlled by any other individual(s) or managing board of directors. Through his ownership of the parent company, the Beneficiary holds a similar role with the Petitioner. There is no evidence that anyone other than the Beneficiary himself is in a position to exercise any control over the work he did or will perform, or that the Beneficiary was hired or is subject to firing by another individual or board. Although it appears that the Petitioner may intend for the Beneficiary to be an employee, the Beneficiary does not report to any higher authority. Further and absent evidence to the contrary, the Beneficiary did and will greatly influence the organizations as the final and ultimate decision maker and will be the only person sharing in the profits, losses, and liabilities of the Petitioner. As such and for all practical purposes, the record does not establish that the Beneficiary, who will control the organization, set the rules governing his work, and share in all profits and losses, was an "employee" of the foreign entity or will be an "employee" of the Petitioner.

In the denial notice, the Director stated: "Since the beneficiary owns the foreign company and reports to no one, it is unlikely he receives any guidance or supervision from a higher source" as the statutory definition of executive capacity requires. On motion, the Petitioner asserted that the Director is "splitting hairs," and the Petitioner acknowledged the Beneficiary's ultimate authority:

[3] *Clackamas*, 538 U.S. at 449-450 (deferring to the factors enumerated in the Equal Employment Opportunity Commission's *Compliance Manual* § 605:0009 (EEOC 2000) (currently cited as § 2-III(A)(1)(d)) for determining "whether [a partner, officer, member of a board of directors, or major shareholder] acts independently and participates in managing the organization, or whether the individual is subject to the organization's control," and accordingly whether the individual qualifies as an employee).

> The beneficiary does not receive more than "general supervision" because he receives no supervision. There is not a requirement in the statutory definition of executive that the individual must report to someone or some body such as a Board, but rather that the supervision over the beneficiary is *d*[*e*] *minim*[*i*]*s* and only "general."

Later, on appeal, the Petitioner stated that the foreign parent company "has an Advisory Board to which [the Beneficiary] reports. As a result he does not have complete unfettered discretion, although he indeed has very little oversight." The Petitioner also contends that the director of a business "can be removed by a Court and disqualified if deemed unfit. . . . As a result the Beneficiary has some oversight." Section 101(a)(44)(B)(iv) of the Act requires "supervision or direction from higher-level executives, the board of directors, or stockholders of the organization." An advisory board does not meet this requirement. The Petitioner is correct that the Beneficiary is subject to the authority of the law, which can step in under extraordinary circumstances, but the courts are not "higher-level executives, the board of directors, or stockholders of the organization."

The Director's unrebutted finding that the Beneficiary is the sole owner of the Petitioner's foreign parent company, and thus, indirectly, of the Petitioner, precludes a qualifying employer/employee relationship between the Petitioner and the Beneficiary. Therefore, whatever his duties, the Beneficiary is the employer rather than an employee. Therefore, the Petitioner has not established that the Beneficiary meets the basic statutory criteria discussed at sections 101(a)(44) and 203(b)(1)(C) of the Act. The Petitioner has not established that the Beneficiary is eligible for the immigrant classification sought in this proceeding.

B. U.S. Employment in a Managerial or Executive Capacity

The regulation at 8 C.F.R. § 204.5(j)(5) requires the Petitioner to submit a statement which indicates that the Beneficiary is to be employed in the United States in a managerial or executive capacity. The statement must clearly describe the duties to be performed by the Beneficiary.

The Director did not issue separate findings regarding the Beneficiary's past experience abroad and his intended future work for the Petitioner in the United States. Instead, the Director issued a joint finding, many elements of which we have already addressed. With respect to the Beneficiary's intended U.S. employment, the Director raised two issues. First, there is the Director's general finding that the Beneficiary answers to no superior authority. We have already discussed this issue, finding that the Beneficiary will not be the Petitioner's employee, and we need not repeat that discussion here.

Second, the Director concluded that the Beneficiary divides his time between the U.S. Petitioner and its foreign parent company, and therefore it does not appear that he will work full-time running the U.S. company. The Director cited no applicable source cited for this requirement.

It is not inherently disqualifying for the Beneficiary to devote some of his time to the foreign parent company. There is a clear link between the business activities of the Petitioner and its parent; they are not unrelated entities connected only by shared ownership. The Petitioner and its parent constitute, in this sense, a single organization for which we could expect some degree of shared governance. As

such, we must take into account relevant evidence in the record concerning the reasonable needs of the organization as a whole, including any related entities within the "qualifying organization." *See Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016).

The Petitioner, on motion, stated that the Director derived the "full-time" requirement from the regulation at 20 C.F.R. § 656.3, which pertains only to immigrant visa classifications that involve labor certification. The Director, however, did not cite the regulation for that reason. Rather, the Director cited the regulation to show that it did not include self-employment. (The Director underscored the phrase "other than oneself.") This regulation does not apply to the present case, but, as we have explained, there are independent grounds to conclude that an effectively self-employed individual cannot qualify as a multinational executive or manager.

Based on the factors discussed above, the Petitioner has not established that it will employ the Beneficiary in a managerial or executive capacity.

IV. DOING BUSINESS

Another ground for denial was the Director's finding that the Petitioner did not establish that it has been doing business for at least one year prior to the date of filing the petition, as required by 8 C.F.R. § 204.5(j)(3)(i)(D). Specifically, the regulation at 8 C.F.R. § 204.5(j)(2) defines the term "doing business" as the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

Throughout this proceeding, including on motion, the Petitioner has referred to "evidence of the company conducting business in the year prior to the petition." Given the petition's filing date of December 31, 2014, the Petitioner must show that it began regularly, systematically, and continuously providing goods and/or services no later than December 31, 2013. Activity during 2014 can attest to the continuity of the Petitioner's business activity, but it cannot establish that the Petitioner had been doing business for at least the required year, because it took place less than a year before the filing date.

The Petitioner filed a certificate of formation in Delaware on December 10, 2008, but this evidence attests only to the company's existence, not to its actively doing business. The Beneficiary's spouse, in her capacity as the foreign parent entity's company secretary, signed a letter dated July 21, 2009, attesting to the Beneficiary's appointment as director of "the new US subsidiary office," but there is no evidence that the company did any business or employed any staff in 2009 or for several years after that date. The Beneficiary does not claim to have worked for the petitioner in the United States before May 2013, and the Petitioner has submitted no evidence that the company had any staff or business activity before the Beneficiary's arrival.

Documentation of the foreign company's activity in 2013 or earlier is not relevant, because it cannot show that the petitioning U.S. entity was doing business. With respect to the U.S. petitioner, the record includes the following documentation from 2013:

- An IRS Form 941, Employer's Quarterly Federal Tax Return, indicating that the Petitioner had three workers on its payroll as of September 12, 2013
- A Florida RT-6 quarterly return, indicating that the Petitioner paid one worker (the Beneficiary) in July and August 2013, and three in September 2013
- Information relating to the Petitioner's rental of exhibit space at a September 2013 trade show
- Email correspondence from June to November 2013, in which the Beneficiary discussed proposals, specifications, and prototypes with various clients. The correspondence did not refer to any past or pending sales, except with regard to sales by the foreign parent company.
- A "Client Profile" from the summer 2013 newsletter of the
- A purchase order dated October 20, 2013, from an airline in ordering 49,984 bottles of liquid hand soap
- An invoice dated June 13, 2013, relating to an order from an airline in for 320 liquid soap dispensers

Two documented orders from 2013 do not demonstrate that the Petitioner (as opposed to its foreign parent company) regularly, systematically, and continuously provided goods or services no later than December 31, 2013. Also, the customer appears to have placed its order with the Petitioner's foreign parent company, which credited the sale to the U.S. Petitioner. The invoice showed the Petitioner's U.S. address and telephone number, but also several indications that the client placed the order with the parent company in the United Kingdom:

- Every date on the invoice is in the European format, e.g., "13th June, 2013"
- It shows the parent company's VAT (value added tax) number
- It specified that "[n]o VAT is charged on goods exported." The United States does not charge a VAT, but the United Kingdom does. Only in a country that charges a VAT would there be a need for a VAT line item on a sales order or invoice.
- It instructed the purchaser to "make payment by transfer into our USA account," which would be a redundant instruction if the order was placed with a U.S. company in the first place.

Although the Petitioner solicited potential customers in 2013, the record shows a time lag of several months from initial contact to sales. One commercial airline in for example, provided the Petitioner a set of specifications on September 16, 2013, but it did not execute a sales contract with the Petitioner until February 5, 2014, less than 11 months before the petition's filing date. The order from October 20, 2013, showed a delivery date of February 1, 2014, 11 months before the filing date.

The client profile does not show that the Petitioner was doing business in summer 2013. It refers to the company's "first potential major . . . client," and appears to indicate that the Beneficiary was the only person on staff. The profile reported the Petitioner's expectations "to make an impact on the hotel industry by late 2013," but the record does not include any evidence of later sales to hotels.

The Petitioner has submitted copies of its 2014 IRS Form 1120 income tax return (which shows the Petitioner's incorporation date as October 11, 2013). The Petitioner has not submitted its 2013 tax return or any evidence that it filed one. The Petitioner's 2014 tax return included IRS Form 2220, Underpayment of Estimated Tax by Corporations. Line 4 of that form instructed the Petitioner to "[e]nter the tax shown on the corporation's 2013 income tax return." The Petitioner wrote "[n]ot applicable," which is consistent with the Petitioner having filed no return in 2013.[4]

The only tax documentation from 2013 in the record concerns the Petitioner's payment of payroll tax to three workers, including the Beneficiary. This is not evidence of doing business, because a startup company can have employees before it has begun providing goods or services.

The evidence discussed above does not show that the Petitioner had begun doing business on or before December 31, 2013.

With respect to 2014, the record contains an agreement with a U.S. airline dated March 27, 2014, about nine months before the filing date. The earliest purchase order from that airline is from May 27, 2014. Above, we noted that the Petitioner executed a sales contract with an airline in on February 5, 2014. The earliest documented sales order from that airline is dated May 19, 2014. This evidence dates from less than a year before the filing date, and does not establish that the Petitioner was regularly, systematically, and continuously providing goods and/or services at least a year before the filing date. The evidence shows that the Petitioner was doing business less than one year prior to filing; it does not show that the business activity began at least a year before the filing date.

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal, we conclude that the Petitioner has not established that it has been doing business for at least one year prior to the date of filing the petition.

V. ABILITY TO PAY

The fourth and final cited basis for the denial of the petition is the Director's finding that the Petitioner did not establish its ability to pay the Beneficiary's proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) lists the evidentiary requirements:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate

[4] We acknowledge that the Petitioner did not check a box indicating that the 2014 return was the company's initial return, but it remains that the Petitioner has not submitted a 2013 return or established that it filed one.

> cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

On Form I-140, the Petitioner indicated that it would pay the Beneficiary $86,000 per year. The Petitioner did not initially submit any of the required evidence to show its ability to pay this amount. When the Petitioner did not submit this evidence in response to the RFE, the Director cited this omission as one of the grounds for denial.

On motion, the Petitioner submitted copies of its 2014 federal tax return, and IRS Forms W-2, Wage and Tax Statements, showing that the Petitioner paid the Beneficiary $86,000.04 in 2014, and $93,166.71 in 2015.

The record now contains evidence to establish that the Petitioner was able to pay, and did in fact pay, the Beneficiary's proffered wage as of the filing date and beyond. We therefore withdraw this ground for denial of the petition.

VI. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of F-USA LLC*, ID# 87862 (AAO Nov. 17, 2016)