U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16026958

DATE: APR. 15, 2021

Motion on Administrative Appeals Office Decision

Form I-129, Nonimmigrant Petition for an Intracompany Transferee

The Petitioner describes itself as a heavy equipment supply company specializing in scaffolding rentals, heavy equipment training, and lifting equipment inspection and certification It seeks to temporarily employ the Beneficiary as chief executive director in its "new office"[1] 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. The Director determined that the Petitioner did not establish (1) that it had a qualifying relationship with the Beneficiary's foreign employer at the time the petition was filed; (2) that the Beneficiary was employed abroad for at least one year during the three years preceding the filing of the petition; (3) that the Beneficiary's foreign employment was in a managerial or executive capacity; and (4) that the new office in the United States would support the Beneficiary in a managerial or executive position within one year of the petition's approval.

We dismissed the Petitioner's appeal on the ground that the Petitioner did not establish that it would support the Beneficiary in a managerial or executive capacity within one year of the petition's approval. Since this determination by itself was dispositive of the appeal, we reserved the Petitioner's arguments with regard to the other three grounds for denial, citing *INS v. Bagamashad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n. 7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

The matter is now before us on a motion to reopen and a motion to reconsider. A motion to reopen must state new facts and be supported by affidavits or other documentary evidence. *See* 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that the previous decision was based on an incorrect application of law or USCIS policy. *See* 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit. Upon review, however, we will dismiss the motions.

[1] A "new office" is an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary 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 one year within the date of approval of the petition to support an executive or managerial position.

I. ANALYSIS

In our previous decision dismissing the appeal we reviewed the statutory definitions of "managerial capacity" and "executive capacity" in section 101(a)(44)(A) and (B) of the Act[2] as well as the regulatory requirements for a new office set forth at 8 C.F.R. § 214(l)(3)(v)(C), which provides that:

> If the . . . beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office . . . the petitioner shall submit evidence that . . . [t]he intended United States operation within one year of the approval of the petition, will support an executive or managerial position . . . supported by information regarding:
> (*1*) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
> (*2*) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
> (*3*) The organizational structure of the foreign entity.

In our decision we discussed the initial evidence submitted by the Petitioner which included a statement regarding its plan for the U.S. business, a formal business plan containing a projected organizational chart, projected hires over a five-year period, and prospective equipment purchases with a wide range of estimated costs over a five-year period. In response to the Director's request for evidence (RFE) the Petitioner submitted an updated business plan with the same organizational chart but new hiring projections that conflicted with the hiring projections in the original business plan. Despite being requested to do so in the RFE, the Petitioner did not furnish job duty descriptions of the prospective employees, nor a timeline for their hiring, nor any additional information about the costs of its prospective equipment purchases. These evidentiary gaps, we pointed out, precluded the

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[2] As defined in section 101(a)(44)(A) of the Act, the term "managerial capacity" means 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. All four elements must be met for the assignment to qualify as "managerial capacity" employment.

As defined in section 101(a)(44)(B) of the Act, the term "executive capacity" means 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. All four elements must be met for the assignment to qualify as "executive capacity" employment.

Director from determining what sort of staffing the Petitioner would have in place after a year of operation and whether the Beneficiary would be relieved of performing primarily non-managerial or non-executive duties. On appeal the Petitioner asserted that its staffing levels are not constant because its business is "service-oriented" and operates "on a call-out basis," and that its business plan "serves as a guide and not an actual transaction of business."

We concluded that the record did not demonstrate that the Petitioner, within one year of the petition's approval, would have a support staff in place to relieve the Beneficiary from performing primarily non-qualifying duties such as marketing, selling, and brokering deals with clients. Highlighting the evidentiary shortcomings, we reiterated that the Petitioner's organizational chart was inconsistent with the proposed list of hires, that no employee job descriptions had been submitted, and that no hiring timeline had been presented for filling specific positions. Finally, we reviewed the Beneficiary's proposed job duties during the start-up year of the U.S. office, but noted that no separate description of his job duties following the start-up year had been submitted, even after a specific request in the Director's RFE. While acknowledging that the Beneficiary would be the Petitioner's primary employee with authority to make financial decisions and set the overall direction of the business, and that he would likely continue to exercise discretion over business operations and retain decision-making authority beyond the initial one-year start-up phase, we stated that the Petitioner had not submitted sufficient information to establish that the Beneficiary's duties would be primarily managerial or primarily executive in nature, as defined in section 101(a)(44)(A) or (B) of the Act, within one year of the petition's approval.

A. Motion to Reopen

In its motion the Petitioner refers to a previously submitted letter describing the "basic duties of the [B]eneficiary," but states that it does not have any further evidence to submit. The Petitioner asserts that the job duties described in previous documentation – including the opening of bank accounts, securing company offices, payments of company invoices, and deciding to establish a warehouse in Corpus Christi – are evidence enough that the Beneficiary was "already working as a manager or/and executive" during the U.S. office's first year of operation. According to the Petitioner the Beneficiary hired a "Project Estimator . . . to help in bidding with GCs and Subcontractors across Texas as well as Online via various Plan Rooms/Bidding Platforms and Apps . . . helping the [B]eneficiary to carry out business development, Online Plan rooms, [and] meeting with clients." The Petitioner also asserts that the Beneficiary "approved the recruitment of a new 'Administrator Assistant' to help with follow up/receiving client calls, payrolls, administrative works etc." Despite these claims of new hires, the Petitioner submits no documentary evidence thereof with its motion, such as job offer letters or pay statements, as required by 8 C.F.R. § 103.5(a)(2).

Thus, the Petitioner does not meet the basic regulatory requirement of documentary evidence to support the new facts it alleges in the motion to reopen. Even if evidence were submitted that a "project estimator" and an "administrator assistant" had been hired, it does not appear that either of those positions is managerial, supervisory, or professional in nature. Therefore, the Beneficiary would not be supervising and controlling the work of other supervisory, professional, or managerial employees, as required to meet the second definitional requirement of "managerial capacity" at section 101(a)(44)(A)(ii) of the Act, and in the absence of any subordinate management personnel would not

be directing the management of the organization, as required to meet the first definitional requirement of "executive capacity" at section 101(a)(44)(B)(i) of the Act. The Petitioner has not shown that the alleged employment of a "project estimator" and an "administrator assistant" would elevate the Beneficiary's position to one of managerial or executive capacity, as defined in the Act.

For the reasons discussed above, the motion to reopen does not meet the requirements of 8 C.F.R. § 103.5(a)(2).

B. Motion to Reconsider

In its motion the Petitioner asserts that we have acknowledged the Beneficiary's authority to make decisions and that he "will manage and direct company work," which is enough to meet the definitional requirements of an "intracompany transferee" at 8 C.F.R. § 214.2(l)(1)(ii). That is not correct. While the record indicates that the Beneficiary at the close of the one-year start-up period will have broad decision-making authority over business operations and personnel, the Petitioner has not submitted sufficient information to establish that the Petitioner will have a support staff in place to relieve the Beneficiary of performing non-qualifying duties such as routine administrative tasks and the day-to-day business operations of selling products and providing services. Furthermore, the Petitioner has not established that it will have any managerial, supervisory, or professional employees aside from the Beneficiary at the end of one year. Thus, the Beneficiary could not meet the definitional requirement of "managerial capacity" at section 101(a)(44)(A)(ii) of the Act because he will not supervise and control the work of other supervisory, professional, or managerial employees, and he could not meet the definitional requirement of "executive capacity" at section 101(a)(44)(B)(i) of the Act because in the absence of any subordinate managerial employees he will not "direct the management" of the business.

The Petitioner does not specify on motion whether it is claiming "managerial capacity" or "executive capacity" for the Beneficiary, but suggests that the Beneficiary is managing, or directing the management of, an "essential function" of the business, within the meaning of section 101(a)(44)(A)(ii) or B(i) of the Act. The Petitioner has not defined what the "essential function" is, however, without which we have no basis to consider this claim.

Thus, the Petitioner has not established that our previous decision was based on any incorrect application of law or USCIS policy, as required for a motion to reconsider under 8 C.F.R. § 103.5(a)(3).

II. CONCLUSION

The Petitioner has not shown proper cause for reopening or reconsideration of our prior decision. Accordingly, the motions will be dismissed.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.