U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF R-USA LLC

DATE: APR. 25, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a management consulting company, seeks to extend the Beneficiary's temporary employment as its vice 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 Vermont Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity in the United States and that its parent company continued to do business in India. We dismissed the Petitioner's appeal, affirming the Director's determination that the record did not establish the Beneficiary would be employed in an executive capacity under the extended petition. We further determined, after issuing a notice of intent to dismiss (NOID), that the Petitioner had willfully misrepresented material facts pertaining to the Beneficiary's employment with its parent company, leading us to conclude that he was not employed by that company for one year in the three years preceding the filing of the petition.

In its motion to reopen, the Petitioner submits a brief and additional evidence, including new affidavits and supporting documents that address our finding of willful misrepresentation of material facts, as well as copies of documents that were submitted earlier in these proceedings.

Upon review, we will deny the motion.

I. MOTION REQUIREMENTS

To merit reopening or reconsideration, a petitioner must meet the formal filing requirements (such as submission of a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee), and show proper cause for granting the motion. 8 C.F.R. § 103.5(a)(1).

A motion to reopen is based on factual grounds and must (1) state the new facts to be provided in the reopened proceeding; and (2) be supported by affidavits or other documentary evidence. 8 C.F.R.

§ 103.5(a)(2). We may grant a motion to reopen that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

At issue in this matter is whether the newly submitted facts and evidence overcome our previous findings that the Petitioner (1) willfully misrepresented material facts regarding the Beneficiary's employment with its foreign parent company, and (2) did not establish that the Beneficiary would be employed in an executive capacity in the United States under the extended petition.

For the reasons discussed below, we will deny the motion to reopen as the Petitioner has not overcome the grounds for dismissal of the appeal.

A. Willful Representation of Material Facts

In dismissing the appeal, we determined that the Petitioner had willfully misrepresented material facts in claiming that the Beneficiary was employed as vice president of its Indian parent company, from June 2005 until December 2007. Prior to issuing this finding, we obtained copies of the Beneficiary's nonimmigrant visa application[1] submitted to the U.S. Consulate in in October 2007. In the NOID, we advised the Petitioner that the Beneficiary did not identify as a current or former employer where asked for details about his current employment and work history on the visa application forms, which he had signed, thereby certifying that the information provided was "true and correct to the best of [his] knowledge and belief." This information directly contradicted the Petitioner's claims regarding his foreign employment.

In response, the Petitioner submitted a copy of the Beneficiary's 2007 Form DS-157, explaining that this form did not require information about his current employment. We emphasized that the Petitioner did not provide copies of the Beneficiary's Forms DS-156 or DS-158, both of which clearly required the Beneficiary to identify his current employer. We determined that it had not overcome this major discrepancy. Further, we discussed other evidence which raised doubts about the Beneficiary's claimed employment, including the fact that he was enrolled as a master's degree student at an Indian university during the claimed period of foreign employment and the Petitioner had not supported its claim that this was a part-time program that did not require his attendance during typical weekday business hours. Therefore, we concluded that the Petitioner willfully submitted a number of false documents, including letters and payroll documents, intended to establish that the Beneficiary had worked for

On motion, the Petitioner attributes the employment information provided on the Beneficiary's 2007 nonimmigrant visa application to "unintended errors" made by the travel and visa agent he allegedly

[1] We reviewed Form DS-156, Nonimmigrant Visa Application; Form DS-157, Supplemental Nonimmigrant Visa Application; and Form DS-158, Contact Information and Work History for Nonimmigrant Visa Applicant, all of which were submitted as part of the Beneficiary's application for an F-1 nonimmigrant (student) visa.

used to assist him with his F-1 visa application. The Petitioner submits an affidavit from the Beneficiary and two letters from [redacted] in support of this claim.

The Beneficiary declares, as he has done previously, that he worked full-time for [redacted] from 8:00 a.m. to 4:30 p.m. on weekdays from June 2005 until December 2007, while completing his master's degree in a part-time program that required class attendance between 6:00 and 10:00 p.m., three to four days per week. He further reiterates that he worked for the two employers listed on his visa applications to fulfill industrial training requirements for his degree program, and that the assignments were project based and required office attendance on weekends only.

The Beneficiary states that he hired [redacted] as his agent to prepare his F-1 visa application in June 2007 and the agent "was supported to prepare all forms and documents according to information [he] provided." He declares that, prior to the denial of the appeal he "had no reference as to what this agent had filled in forms DS-156, DS-157 & DS-158" and "did not read the information filled in them until recent notice sent by AAO." The Beneficiary indicates that "all the missing & misleading information is not filled in by [him]" and that he "was shown and was told to sign this form on the day of submission to the US Visa application centre in [redacted] India." He acknowledges that he "may have signed and submitted" the forms but they "do not reflect the true history of [his] employment in India."

A letter form [redacted] proprietor, [redacted] confirms that the Beneficiary hired her agency to assist him with applications to U.S. universities and to prepare his F-1 visa application. [redacted] states that [redacted] "prepared and filled in the Forms DS-156, DS-157 & DS-158." She goes on to explain that there was an unintended error on the DS-156 and that the preparer should have stated the Beneficiary's current employment as "Vice President" rather than "Student Completed," noting that there may have been confusion because he had recently completed his master's degree. [redacted] further states there was an unintentional error on the Form DS-158 in that the preparer failed to list the Beneficiary's then-current employment with [redacted]

As an explanation for how the Beneficiary may have overlooked these claimed errors, [redacted] states:

> [The Beneficiary] was to meet us at USA VFS Application Center in [redacted] . . . and was shown these forms for the first time along with other documents that he had already provided. We requested him to sign forms at proper locations and then he submitted to the USA Visa Application Center 5 days before Visa Interview. This process is done with many students at USA Visa Application Center and due to extreme rush at such location [the Beneficiary] may not have noticed the errors.

In a separate letter, [redacted] office manager provides a list of documents the Beneficiary submitted to the agency in connection with his F-1 visa application and asserts that copies of these documents are in its records. Attached to the letter are general instructions and document lists related to the visa application process, none of which contain any references to the Beneficiary.

Upon review of this newly submitted evidence, the Petitioner has not overcome our finding that it willfully misrepresented material facts regarding the Beneficiary's foreign employment. The Beneficiary's Nonimmigrant Visa Application signed on October 26, 2007, was previously incorporated into the record of proceedings. Line #39 on DS-156 asks the applicant: "Was this Application Prepared by Another Person on Your Behalf?" The response given was "No." Item #40 on the DS-156 requests the name, address, signature, and date of signature for the person who prepared the application and for that person's relationship to the applicant. This item was left blank. The Beneficiary and both claim to have a copy of the submitted DS-156, but neither has explained why an employee of would deny preparing the application if they did in fact prepare it.

In light of this unresolved discrepancy, the evidence submitted is insufficient to establish that and not the Beneficiary, actually prepared the DS-156, DS-157 and DS-158. claims to have copies of all documents the Beneficiary submitted to them, but did not provide these documents for review, nor did it provide evidence of any personal correspondence, agreements or receipts related to the service it claims it provided to the Beneficiary.

Further, we notified the Petitioner of the discrepancies in the nonimmigrant visa application forms prior to the dismissal of the appeal, and it submitted an affidavit from the Beneficiary in response to the NOID. The Beneficiary stated at the time that he had "conducted a diligent pursuit of [his] records" and "made appropriate enquiries of others to inform [himself] in order to make this affidavit." He makes this same statement in the newly submitted affidavit, but does not explain why he did not previously discover or disclose that he did not prepare his own visa application.

In addition, the evidence submitted on motion does not address our finding that the Beneficiary's enrollment in a master's degree program undermined its claim that he was a full-time employee of during the same time period. The Beneficiary states that he was a part-time student, but there is no indication from the institution he attended that its master of e-Business degree was designed as a part-time program. Absent such evidence, it is unclear how the Beneficiary as a part-time student, would have completed the program within the standard four semesters allotted.

Overall, the newly submitted evidence does not establish that the Beneficiary did not prepare the nonimmigrant visa application forms or that he reasonably did not have knowledge of their content. As we have no reason to doubt the credibility of the Beneficiary's statements on his student visa application, we affirm our conclusion that the Petitioner misrepresented material facts and submitted false documents in an attempt to establish that the Beneficiary was employed by for at least one year in the three years preceding his initial entry to the United States in 2007.

B. U.S. Employment in an Executive Capacity

In dismissing the appeal, we also found that the record was insufficient to establish that the Petitioner would employ the Beneficiary in an executive capacity, as defined at section 101(A)(44) of the Act, under the extended petition. We analyzed the Beneficiary's stated job duties in light of the nature, scope and structure of the business as documented in the record and determined that the

Petitioner did not demonstrate that the Beneficiary would primarily perform executive duties as of the date of filing in January 2015.

We acknowledged the Beneficiary's authority over staff and business matters, but explained that, based on the overall absence of a documented managerial staff and administrative and sales personnel to perform non-executive functions, the record did not show the Beneficiary's actual duties would be primarily executive in nature. For example, the Petitioner stated the Beneficiary would spend more than one-third of his time supervising subordinate department managers, but we found this claim implausible as the company had only three employees, including the Beneficiary and his supervisor, the company president, at the time of filing. Many positions were vacant and the Petitioner did not explain how responsibilities attributed to these positions were distributed among the three employees it had at the time of filing. We also acknowledged that the Petitioner claimed for the first time on appeal that the Beneficiary would be supervising an 18-person team of "managers and associates" employed by the foreign parent company but found that the Petitioner had not adequately documented or explained what roles they assumed or explained why it had not mentioned the foreign staff prior to the denial of the petition.

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). We interpret "new facts" to mean facts that are relevant to the issue(s) raised on motion and that have not been previously submitted in the proceeding, which includes the original. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts."

Here, the majority of evidence submitted on motion was previously submitted at the time of filing, in response to the Director's request for evidence, or in support of the appeal. This evidence includes copies of project management consulting contracts and related documents, as well as position descriptions for subordinate employees and contractors, none of which were shown to work for the company at the time of filing. The Petitioner does not explain why this evidence is being re-submitted in support of its motion to reopen and does not claim that we overlooked it previously. In addition, significant portions of the brief submitted on motion were taken verbatim from the brief submitted in support of the appeal. Statements and evidence that were previously submitted are not "new facts" and we will not discuss them further here.

The Petitioner does submit for the first time a copy of its New Jersey Form NJ-927, Employer's Quarterly Report, for the first quarter of 2015, a document which provides further insight into the staffing of the company at the time of filing. During that quarter, the Petitioner paid $20,000 in wages to three employees, including $15,000 to the Beneficiary, $2,500 to the company president and $2,500 to [redacted] whose position title has not been provided. This evidence further undermines the Petitioner's claim that the Beneficiary would be spending more than one-third of his time overseeing multiple department managers and their managerial and professional staff. Rather it shows that the company employed, at most, one employee subordinate to the Beneficiary who did not work on a full-time basis, and casts further doubt on the Beneficiary's stated duties.

The Petitioner's brief also includes an expanded position description in which the Petitioner focuses on how the Beneficiary's role meets the statutory definition of "executive capacity." The description, while lengthy, does not provide new information about his position as of the date of filing or provide additional insight into the nature of his day-to-day tasks at that time. Rather, the description focuses on his authority to make decisions and establish policies and objectives, and his authority over employees who did not work for the company when the petition was filed.

As noted in our prior decision, the Beneficiary level of authority is not in question. However, to establish that the Beneficiary will be employed in an executive capacity, the Petitioner must show that the Beneficiary will perform certain high-level responsibilities stated in the statutory definition. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See, e.g.*, *Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d at 1533. Here, the Petitioner did not establish how the Beneficiary would be relieved from performing operational activities.

The Petitioner is engaged in providing management consulting services and at the time of filing employed a president, a vice president, and a part-time employee whose position and job duties have not been disclosed. The Petitioner claims it uses consultants to manage its hotel development project management consulting contracts, but did not adequately document the services they provided at the time of filing. The evidence indicates that the Petitioner also provides management consultant services to clients outside the hospitality industry and has not identified any employee or contractor who provides these services. It submitted an organizational chart with eight or more vacancies at the time of filing and did not explain how it was operating with so many key operational and administrative positions left unfilled. For these reasons, the newly submitted explanation of the Beneficiary's position, when considered in the context of the totality of the evidence, does not overcome the basis for dismissal of the appeal.

III. CONCLUSION

For the reasons discussed, the Petitioner has not shown proper cause to reopen the proceeding or established eligibility for the immigrant benefit sought.

ORDER: The motion to reopen is denied.

Cite as *Matter of R-USA LLC*, ID# 321203 (AAO Apr. 25, 2017)