U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-C-E-, LLC

DATE: AUG. 16, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a raw lumber exporter, seeks to temporarily employ the Beneficiary as the general manager and president of its new office[1] 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 an executive or managerial capacity.

The Director of the Vermont Service Center denied the petition, concluding that the Petitioner did not establish, as required, that the Beneficiary has been employed in a managerial capacity abroad and that he would be employed in the United States in a managerial or executive capacity within one year of approval of the new office petition. We dismissed the Petitioner's subsequent appeal and upheld both grounds for denial.

The matter is now before us on a motion to reconsider. In support of its motion, the Petitioner states that the Beneficiary has been and would be employed as a function manager and argues that we did not apply the holdings of two relevant adopted decisions that focus on the role of an L-1A function manager.

Upon review, we will deny the motion to reconsider.

I. REQUIREMENTS FOR A MOTION TO RECONSIDER

A motion to reconsider is based on legal grounds and must (1) state the reasons for reconsideration; (2) be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or policy; and (3) 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). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

[1] The term "new office" refers to an 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). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation no more than one year within the date of approval of the petition to support an executive or managerial position.

II. ANALYSIS

The issue in this matter is whether the Petitioner has established that our decision to dismiss the Petitioner's appeal was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy to the facts of this case.

For the reasons discussed below, we will deny the motion to reconsider. While the current motion includes newly submitted assertions that we incorrectly applied the law and USCIS policy to the facts presented, the Petitioner has not shown proper cause for reconsideration or established eligibility for the benefit sought.

In support of the motion to reconsider, the Petitioner contends that our decision was erroneous with respect to the Beneficiary's position abroad as well as his proposed position in the United States.

A. Foreign Employment

In its discussion of the Beneficiary's employment with the foreign position, the Petitioner references two ninth circuit decisions – *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision) and *Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006) – that we previously cited in our dismissal of the appeal. The Petitioner contends that these decisions do not support our focus on a beneficiary's "day-to-day" job duties as an indicator of the managerial or executive nature of a given position.

We find that the Petitioner's reliance on the referenced case law is flawed, as both decisions focus primarily on the relevance of a company's size as an indicator of whether that company can support a primarily managerial or executive position. Neither decision specifically addresses the significance of a detailed job description or precludes us from looking to a beneficiary's daily job duties to clarify ambiguities in an overly broad job description, particularly when those ambiguities cause us to question whether a given position is primarily managerial or executive in nature. In fact, the actual duties themselves reveal the true nature of the employment. *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). If the Petitioner cannot articulate the Beneficiary's specific job duties, it effectively precludes us from making a determination as to the managerial nature of the Beneficiary's position.

In the present matter, we discussed the Beneficiary's foreign job description and explained precisely why we found that job description to be insufficient. Moreover, we noted that on appeal the Petitioner rearranged the time allocations for the previously submitted list of duties without explaining why this change was made; we further noted that the overall time allocated did not total 100 percent. The Petitioner has not addressed or resolved this ambiguity on motion. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

We also disagree with the contention that we did not consider the foreign entity's reasonable needs. In fact, we found that the Petitioner did not establish that the foreign entity relies on contract services

to support the Beneficiary in a managerial position, nor did it explain how the foreign entity's financial statements and its "formal legal and accounting structure" are instrumental in demonstrating that the Beneficiary's position abroad was comprised of primarily managerial duties. These findings indicate that we took into account the nature of the foreign entity's business, along with its date of establishment, size, and staffing composition, thereby indicating that we considered the foreign entity's reasonable needs.

Furthermore, we find that the Petitioner does not show that its facts and circumstances are analogous to those in *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016), where we determined that the petitioner provided a detailed job description and documented its reliance on an overseas staff to support the beneficiary's role as a function manager in the United States. Here, we determined that the Petitioner provided a deficient job description and did not adequately establish that the foreign entity's organizational structure was sufficient to relieve the Beneficiary from having to allocate his time primarily to the company's operational tasks. Likewise, the Petitioner has not established that it satisfied the five-prong criteria that was outlined in *Matter of G- Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017), in which we determined that to be deemed a "function manager" the petitioner must demonstrate that: (1) the function is a clearly defined activity; (2) the function is "essential," i.e., core to the organization; (3) the beneficiary will primarily *manage*, as opposed to *perform*, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations. In fact, the Petitioner points to "the essential marketing, financial, and administrative functions of the Company," but does not demonstrate that the functions are clearly defined activities or that the Beneficiary managed these functions, as opposed to performing the underlying operational tasks necessary to execute these functions. In light of these deficiencies we find that the Petitioner's reliance on the two adopted decisions is misplaced.

Lastly, the Petitioner claims that we mischaracterized the Beneficiary's foreign subordinates as holding "non-professional positions," despite their respective duties and college levels of education. We note, however, that this issue was adequately addressed in our prior decision where we expressly stated that the Petitioner did not describe specific duties that would require a bachelor's degree.[2] The Petitioner has not cited to a pertinent precedent decision to establish that our finding was based on an incorrect application of law or policy.

For the above stated reasons, the Petitioner has not shown that the Beneficiary was employed abroad in a managerial capacity or that we failed to consider the Petitioner's claims in accordance with applicable law and policy.

[2] *Cf.* 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation").

B. U.S. Employment

We similarly find that the Petitioner has not established that we erred in our decision regarding the Beneficiary's proposed position with the U.S. entity.

Our determination was based on a comprehensive analysis of the Beneficiary's proposed job description and the Petitioner's staffing and business plan. More specifically, we determined that the Petitioner provided a deficient job description, which lacked a direct nexus between the Beneficiary's broadly stated proposed job responsibilities and the Petitioner's lumber export operation. We noted that the Petitioner did not provide adequate information about the Beneficiary's daily involvement in procuring lumber, negotiating contracts, reviewing orders, identifying market opportunities, and allocating resources, all of which we deemed to be operational, rather than managerial job duties. In other words, the Petitioner did not provide sufficient evidence to establish that it would have the ability to relieve the Beneficiary from having to be directly involved in actually carrying out these non-managerial duties within one year from the date of this petition's approval. We also found that the Petitioner's projected hiring plan was insufficient and that it did not provide sufficient evidence to support the claim that it would rely on contractors and foreign staff to carry certain critical operational tasks within the organization. Although the Petitioner disputes these findings and points to the Petitioner's projected sales of approximately $1 million dollars during its first year of operation, it does not cite to pertinent precedent decisions to establish that the decision was based on an incorrect application of law or policy, nor does it establish that the decision was incorrect based on the evidence that was available to us at the time we made our prior decision. 8 C.F.R. § 103.5(a)(3). In sum, the Petitioner has not submitted evidence that would meet the requirements of a motion to reconsider. Accordingly, the motion to reconsider must be denied.

III. CONCLUSION

For the reasons discussed, the Petitioner has not shown proper cause for reconsideration.

ORDER: The motion to reconsider is denied.

Cite as *Matter of E-C-E-, LLC*, ID# 1574607 (AAO Aug. 16, 2018)