U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-A- INC.

DATE: AUG. 30, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a clothing distributor, seeks to temporarily employ the Beneficiary as president of 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 Vermont Service Center denied the petition, concluding that the record did not establish, as required, that: (1) the Beneficiary has at least one year of continuous full-time employment with a qualifying entity abroad in the three years preceding the filing of the petition; (2) the new office would support a managerial or executive position within one year of approval of the petition; and (3) the Petitioner has a qualifying relationship with the Beneficiary's foreign employer. The Petitioner appealed the denial of the petition. We withdrew the third ground for denial but dismissed the appeal based on the first two grounds.

The matter is now before us on a combined motion to reopen and reconsider. On motion, the Petitioner submits additional evidence and asserts that we erred by misreading the Beneficiary's Indian income tax returns, and by not taking the Beneficiary's vacation time into consideration when calculating his employment abroad.

We will deny both motions.

I. MOTION REQUIREMENTS

A motion to reopen is based on documentary evidence of *new facts*, and a motion to reconsider is based on an *incorrect application of law or policy*. We will discuss the requirements of each type of motion below. 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.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) limits our authority to reopen the proceeding to instances where the Petitioner has shown "proper cause" for that action. Thus, to merit reopening, a petitioner must not only meet the formal filing requirements (such as submission of a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee), but also show proper cause for granting the motion. We cannot grant a motion that does not meet applicable requirements. *See* 8 C.F.R. § 103.5(a)(4).

II. MOTION TO RECONSIDER

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy.

In our dismissal notice, we agreed with the Director's finding that the Petitioner did not establish that the Beneficiary had at least one year of continuous full-time employment with a qualifying entity abroad in the three years preceding the filing of the petition, as required by 8 C.F.R. § 214.2(l)(3)(iii). We found that the Beneficiary's employment abroad ended before the Beneficiary entered the United States on January 22, 2015, more than two years before the petition's filing date of January 31, 2017. On motion, the Petitioner submits no new facts or evidence relating to that employment. The Petitioner only seeks reconsideration, not reopening, relating to this issue.

The petition was filed more than two years after the Beneficiary stopped working abroad. An interruption in employment lasting more than two years, whether that interruption occurred in the United States or abroad, is inherently disqualifying. *Cf. Matter of S-P-, Inc.*, Adopted Decision 2018-01 4 (AAO Mar. 19, 2018).[2]

On motion, the Petitioner does not contest our findings regarding the chronology of the Beneficiary's employment abroad. Instead, the Petitioner acknowledges that the Beneficiary's employment "was short . . . 6 working days," but asserts: "the beneficiary can be excused for the 6 working days, as vacation period was not considered in the one year period."

The Beneficiary was employed abroad for less than one continuous year during the three years preceding the filing of the petition. The Beneficiary then entered the United States. Regardless of the reason for entry, time spent in the United States cannot count toward the one year of continuous employment. At most, it stops the employment clock without counting as an interruption, if the

[2] *Matter of S-P-* concerns an immigrant petition for a multinational manager or executive, but the reasoning is the same because the immigrant classification, like the nonimmigrant classification, requires one year of qualifying employment abroad in the three years preceding either the filing of the petition or the beneficiary's relevant entry into the United States. *See* section 203(b)(1)(C) of the Act.

entry was to work in lawful status for a qualifying U.S. employer or a brief trip for business or pleasure. 8 C.F.R. § 214.2(l)(ii)(A). The Beneficiary did not enter the United States for any of these reasons. Rather, he entered as an F-1 nonimmigrant student. This entry was inherently interruptive of the Beneficiary's continuous employment abroad, regardless of whether he had unused vacation time (which the Petitioner claims but does not establish).[3]

Furthermore, we found a discrepancy in the documentation of the Beneficiary's compensation. The Petitioner had submitted purported monthly salary statements from the Beneficiary's foreign employer, indicating that the Beneficiary received Rs16,500 per month for 10 months during India's 2014-2015 tax year. But the Beneficiary did not report any salary income on his 2014-2015 income tax return. Instead, the Beneficiary reported Rs33,053 in interest income, Rs169,689 in profit, and Rs15,647 in commissions.

On motion, the Petitioner states: "The Computation of Total Income (for the year 2014-2015), clearly mentions the income [the Beneficiary] had gained from Bank Interest, which is only 33053.00 Indian Rupees. The rest of the income he gained from his employment." The Petitioner does not address the relevant point, which is that the monthly payroll documents do not agree with the tax return covering the same period of time.

The Petitioner acknowledges that the Beneficiary was employed abroad for less than one year during the three-year qualifying period, and the Petitioner has not addressed or explained discrepancies in the documentation relating to the Beneficiary's compensation from that employment. Therefore, the Petitioner has not established that we erred when we determined that the Petitioner had not met its burden of proof to establish the required year of continuous employment abroad.

The Petitioner's assertions on motion do not establish proper cause for reconsideration.

III. MOTION TO REOPEN

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). The Petitioner has submitted some evidence that is new to the record. For the reasons explained below, however, we find that this evidence does not warrant reopening of the proceeding or approval of the petition.

A petitioner seeking to employ a beneficiary as a manager or executive of a new office must establish that the new office will support an executive or managerial position within one year of approval of the petition. 8 C.F.R. § 214.2(l)(3)(v)(C). The Director determined that the Petitioner did not meet this requirement. The Director found that the Petitioner provided a vague description of the Beneficiary's proposed duties, did not show that it would have sufficient staffing to relieve the

[3] Were we to open the door to allowing vacation time in the United States in lieu of actual employment abroad, we would face the very significant question of how much vacation time to allow. The Petitioner cites no authority for where to draw the line, other than at an actual 365-day year.

Beneficiary from having to perform non-qualifying duties within one year, and did not provide adequate support for the financial projections stated in its business plan.

At the time of filing, the Petitioner's only employee was a part-time office assistant. The business plan submitted with the petition indicated that, within a year of approval of the petition, the company would hire the Beneficiary as president, plus a marketing manager and a sales and marketing representative. The business plan included a "Head Count," showing no increase in personnel through 2021.

The business plan referred to the Petitioner as "a designing and manufacturing company," but the Petitioner did not set forth any plan to employ designers or manufacturing staff, and the company's leased office did not include workspace for designers or clothing manufacturers.

After a request for evidence, the Petitioner revised its plans, stating that it would employ a marketing manager who would supervise six marketing and sales agents and an unspecified number of independent contractors. As stated in our dismissal notice, the Petitioner did not provide a revised business plan or financial figures to show that it would be able to maintain this larger workforce.

We did not accept the Petitioner's revised plan, because (1) the Petitioner had not substantiated its ability to support the positions, and (2) the Petitioner had to establish eligibility, including a viable business plan, at the time of filing. Fundamental revisions to the company's personnel plans in response to a request for evidence cannot establish eligibility at the time of filing. We also found that the Petitioner had not established that the position of sales and marketing manager would be primarily managerial. We concluded:

> The Petitioner has not shown how a staff of two sales and marketing employees and a part-time office assistant would be sufficient to relieve the Beneficiary from significant involvement in the day-to-day operations of its clothing distribution business. The Petitioner estimates that it would have over $1.2 million in sales in its first year. Even if we found that two subordinate sales employees would be sufficient to handle that volume of sales, the Petitioner has not indicated who would be responsible for sourcing or purchasing the company's goods, placing orders, receiving inventory, making deliveries, arranging shipments, or performing routine financial tasks. The Petitioner also describes itself as a "manufacturing and design" company at times, but does not claim it will have employees engaged in design or manufacturing. For these reasons, the Petitioner did not establish that it would employ sufficient subordinate staff to perform the actual day-to-day, non-managerial operations of the company, and has not shown that it will have a reasonable need for the Beneficiary to perform primarily managerial or executive duties within one year.

(Footnote omitted.) On motion, the Petitioner submits tax documentation to show that the Petitioner "intends to achieve the turnover as mentioned in the business plan." The documents show that the Petitioner paid three employees and three contractors during 2017. Of these six individuals, only the

Beneficiary received an amount consistent with a year's full-time employment. Apart from the Beneficiary, the second employee is the part-time office assistant. The Petitioner did not provide further information about the third employee, who earned $5769 in 2017, and the Petitioner did not explain the tasks performed by the three contractors, each of whom earned less than $8500 in 2017.

The Petitioner does not address the specific issues we raised in our dismissal notice. The Petitioner asserts that its revised personnel plan shows enough "other employees to relieve the beneficiary from performing operational duties," but this is not the plan the Petitioner cited at the time of filing. As we noted in our earlier decision, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). A petitioner must establish eligibility at the time of filing. 8 C.F.R. § 103.2(b)(1). The Petitioner has not shown that the new tax documents establish proper cause to reopen the proceeding.

We also agreed with the Director's finding that the Petitioner had not submitted "a detailed, credible account of the duties the Beneficiary would perform on a day-to-day basis by the end of the first year of operations." We raised several specific points, stating, for instance, that the list of duties included planning activities that appear to have been completed (and therefore do not represent ongoing demands on the Beneficiary's time). We also noted that several of the listed duties constitute non-qualifying activities, and that the Petitioner had not accounted for the time spent on other non-qualifying functions, mentioned by the Petitioner elsewhere but excluded from the job description.

On motion, the Petitioner submits a new job description for the Beneficiary. The Petitioner removed the reference to planning the company's organizational structure, but otherwise the new description largely repeats, rearranges, and paraphrases portions of the previous description, while changing the amount of time allocated to some tasks. The new description does not add significant new details or address other concerns we raised in the dismissal notice. As such, the revised job description does not provide proper cause to reopen the proceeding.

IV. CONCLUSION

The Petitioner did not establish that we erred in our prior decision, or submit new evidence to show that the petition was approvable at the time of filing.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of A-A- Inc.*, ID# 1602813 (AAO Aug. 30, 2018)