U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11185273

Date: DEC. 8, 2020

Motions on Administrative Appeals Office Decision

Form I-129, Petition for L-1A Manager or Executive

The Petitioner, a distributor of court recording audio-visual systems and equipment, seeks to continue the Beneficiary's temporary employment as its operations manager 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 Director of the Texas Service Center denied the petition concluding that the Petitioner did not establish that: (1) the Beneficiary would be employed in a managerial or executive capacity under an extended petition; and (2) the Beneficiary had at least one year of qualifying employment abroad in a managerial or executive capacity in the three years preceding his transfer to the United States in L-1A status. We dismissed the Petitioner's appeal from the decision. The matter is now before us on a combined motion to reopen and reconsider.

The Petitioner bears the burden of establishing eligibility for the requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will dismiss the motions

I. MOTION REQUIREMENTS

To merit reopening or reconsideration, a petitioner must meet the formal filing requirements (such as, for instance, 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). A motion to reconsider is based on legal grounds and must (1) state the reasons for reconsideration; (2) 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).

II. ANALYSIS

A. Motion to Reopen

On motion, the Petitioner submitted a "copy of the Petitioner's bank statements in order to demonstrate that [the Beneficiary] is bringing in contract work to [the Petitioner]." The Petitioner also submits a copy of the Petitioner's invoices and sales order receipts since 2019 to "demonstrate that [the Beneficiary's] negotiating with agencies has resulted in income for [the Petitioner]."

In the motion brief, the Petitioner also references documentation submitted previously. The motion does not meet the requirements of a motion to reopen. On motion, the Petitioner presents the same arguments that it offered on appeal. For motions to reopen under 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 petition. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts."

Prior to the motion, the Petitioner did not articulate a claim that the Beneficiary would manage an essential function of the organization. *See Matter of G-, Inc.*, Adopted Decision 2017-05, *3 (AAO Nov. 8, 2017). Further, the Petitioner did not establish that the Beneficiary would be supervising any employees as of the date of filing. According to its 2017 and 2018 federal tax returns, the Petitioner paid no salaries and wages to employees and made no payments to contractors in the two years preceding the filing of this extension petition in March 2019. The Petitioner provided an organizational chart which identified the Beneficiary as its sole U.S. employee and included proposed positions for a head of IT, a human resources manager, a pre/post-sales manager and a technical support manager.

On motion, the Petitioner states that the Beneficiary's "work in making contacts with government agencies, negotiating with government agencies, and drafting and signing contracts on behalf of [the Petitioner], is understandably essential to the function of the organization." Further, the Petitioner states that the Beneficiary "acting in his executive capacity and as a managing agent, will oversee the advertising, recruiting, and hiring process." It appears that the Petitioner is now claiming the Beneficiary manages an essential function and performs in an executive capacity even though this was not claimed prior to the motion. These discrepancies cast doubt on the true job duties of the offered position. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies). Further, a motion to must (1) state the new facts to be provided in the reopened proceeding; and they must (2) be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). We note that the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence through affidavits and declarations. Here, the Petitioner submits bank statements and invoices to show sales made by the Beneficiary but this is not sufficient documentary evidence specific to whether the Beneficiary would manage an essential function or act in an executive capacity under an extended petition; as such, it has not met the requirements of a motion to reopen.

On motion, the Petitioner states that the Beneficiary is the only employee but expects to hire additional employees when it has "obtained more government contracts through [the Beneficiary's] continued efforts." Although the Beneficiary may one day manage subordinates, he does not at the time of filing the petition. The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).

Here, the Petitioner has not submitted documentary evidence specific to whether the Beneficiary would act in a managerial or executive capacity under an extended petition; as such, it has not met the requirements of a motion to reopen. Therefore, the motion to reopen is dismissed.

b. Motion to Reconsider

The motion does not meet the requirements of a motion to reconsider. The Petitioner asserts that the Beneficiary is "responsible for managing the company as a whole, hiring employees, and taking personnel actions, and managing the company's day-to-day operations consistent with Section 101(a)(44)(A) of the Act." However, the Petitioner has not set forth sufficient reasons to demonstrate that our previous dismissal 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).

The Petitioner noted on motion that a previous L-1 filing was approved on behalf of the Beneficiary. The approved petition is not part of the file before us, and therefore we cannot determine whether the facts in that petition warranted its approval. An adjudicator's fact-finding authority should not be constrained by any prior petition approval, but instead, should be based on the merits of each case.[1] The prior approval of a visa petition does not create an automatic entitlement to the approval of a subsequent petition for renewal of that visa.[2] Each nonimmigrant petition filing is a separate proceeding with a separate record and a separate burden of proof. In making a determination of statutory eligibility, we are limited to the information contained in that individual record of proceeding. 8 C.F.R. § 103.2(b)(16)(ii). If the previous nonimmigrant petition was approved based on the same evidence contained in the current record, the approval would constitute an error on the part of the Director. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. Matter of Church Scientology Int'l, 19 I&N Dec. 593, 597 (Comm'r 1988).

The Petitioner has not shown that our appellate decision contained errors of law or policy, or that the decision was incorrect based on the record at the time of that decision. Therefore, the motion does not meet the requirements of a motion to reconsider and it must be dismissed.

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[1] USCIS Policy Memorandum PM-602-0151, *Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status* 3 (October 23, 2017), http://www.uscis.gov/legal-resources/policy-memoranda.

[2] *See, e.g.*, *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir. 2007); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988).

III. CONCLUSION

For the reasons discussed, the Petitioner has not shown proper cause for reopening or reconsidering the previous decision or otherwise established eligibility for the immigrant benefit sought. In visa petition proceedings, it is a petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.