U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 6787065

Date: DEC. 11, 2019

Motion on Administrative Appeals Office Decision

Form I-129, Petition for Nonimmigrant Worker (L-1A)

The Petitioner, identified in the petition as an "investment/management company," operates a gas station/convenience store.[1] It seeks to continue the Beneficiary's temporary employment in the United States as "Executive Director" under the L-1A nonimmigrant classification for intracompany transferees.[2] *See* Immigration and Nationality Act (the Act) Section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

The Director of the Vermont Service Center originally denied the petition[3] determining that the Petitioner did not establish, as required, that it would employ the Beneficiary in a managerial or executive capacity under an extended petition. The Petitioner then filed a motion to reopen, which the Director granted, but affirmed the denial of the petition. The Petitioner subsequently filed a motion to reconsider, which was also denied by the Director. The Petitioner later filed an appeal that we dismissed concluding that it did not adequately articulate reasons to reconsider the Director's previous denial of the motion to reconsider. The matter is now before us again on a motion to reconsider.

On motion, the Petitioner contends that we erred in concluding that the Petitioner did not set forth sufficient grounds to reconsider the Director's decision to deny the previous motion to reconsider filed in August 2017. The Petitioner points to a lengthy brief it submitted to the Director on motion and asserts that this articulated sufficient grounds to reconsider the Director's previous decision. In addition, the Petitioner addresses the Director's initial denial of the petition and contends they incorrectly considered its small size and erroneously determined that the Beneficiary would not act in an executive capacity under an extended petition.

Upon review, we conclude that we properly dismissed the Petitioner's appeal; therefore, we will dismiss the motion to reconsider.

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[1] At the time of filing, the Petitioner's operation consisted of a gas station/convenience store and a vape store.

[2] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period September 24, 2015, until September 23, 2016. 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.

[3] The petition was filed on September 23, 2016.

I. 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.

The issue before us is whether our decision to dismiss the Petitioner's appeal was correct. In dismissing the appeal, we emphasized that the Petitioner cited *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016), in support of the motion to reconsider filed with the Director and stated that this adopted decision did not support an error on the part of the Director. We noted that the Petitioner indicated that the Beneficiary would qualify as an executive, not as a function manager, the basis for eligibility addressed in *Matter of Z-A-, Inc.* Therefore, we concluded that the Director was correct in denying the Petitioner's previous motion to reconsider.

The Petitioner has not addressed the primary basis of our previous appeal decision; namely, that it cited a case specific to function managers in a matter in which it was asserting the Beneficiary as an executive. *Matter of Z-A-, Inc.*, Adopted Decision 2016-02. For this reason, we conclude that our previous decision to dismiss the appeal was not in error and will dismiss the motion to reconsider.

Regardless, even if we address the Petitioner's assertion that the Director erred in denying the previous motions and the petition itself, we conclude that the Director did not. The Petitioner contends that the Beneficiary would act in an executive capacity overseeing subordinate managers operating the company's gas station and convenience store and a separate vaping product store. The Petitioner later submitted evidence after the date the petition was filed indicating that it operated a second vaping store, was also investigating other similar locations, and hired additional employees after the date the petition was filed in September 2016. However, we note that the Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). As such, we will only consider the duties of the Beneficiary, and its staffing levels, relevant to the date the petition was filed.

The Petitioner asserts, and continually contended in support of its previous motions and appeal, that the Director did not take into account its reasonable needs and overemphasized its small size in denying the petition. The Petitioner correctly observes that we must take into account the reasonable needs of the organization and that a company's size alone may not be the only factor in determining whether the Beneficiary is or would be employed in an executive capacity. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-executive operations of the company or a company that does not conduct business in a regular and continuous manner. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record. *See Systronics*, 153 F. Supp. 2d at 15.

However, a review of the totality of the evidence indicates that the Beneficiary was more likely than not primary engaged in non-qualifying operational duties and that the Petitioner did not have sufficient

staffing to relieve him from these duties as of the date the petition was filed. For instance, the Petitioner submitted substantial documentation in support of the petition reflecting the Beneficiary's involvement in non-qualifying operational level tasks. For instance, it provided several printouts of its website, coinciding with the date the petition was filed, reflecting the Beneficiary as the contact specific to comments on this page. In addition, the Beneficiary's name appears on several invoices and other transactional documents dated near and after the date of the petition, such as a number of invoices for the purchase of vaping products and another related to buying drapes for the Petitioner's vaping product store. This documentary evidence is particularly noteworthy as during this same period the Petitioner indicated that it was launching two vaping products stores. As such, this evidence indicates that the Beneficiary was likely performing most, or all, of the non-qualifying operational tasks necessary to initiate the operations of the vaping product stores when the petition was filed. This evidence appears to conflict with the Petitioner's assertion that the Beneficiary "will not be performing any non-qualifying (ie. day-to-day administrative and general office) duties." It is also noteworthy that the record includes no documentary evidence of the Beneficiary delegating non-qualifying duties to his claimed managerial subordinates, prior to, or as of the date the petition was filed.

Whether the Beneficiary is an executive employee turns on whether the Petitioner has sustained its burden of proving that their duties are "primarily" executive. *See* sections 101(a)(44)(A) and (B) of the Act. In this matter, the Petitioner did not document what proportion of the Beneficiary's duties would be executive functions and what proportion would be non-qualifying. The Petitioner contended that the Beneficiary's duties were exclusively executive in nature as of the date the petition was filed, but it also lists duties and submits evidence indicating his substantial involvement in administrative or operational tasks, but does not quantify the time he spent on these different duties. For this reason, we cannot determine whether the Beneficiary was primarily performing the duties of an executive when the petition was filed. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Therefore, the Director did not err in concluding that the Beneficiary was likely primarily engaged in non-qualifying operational duties as of the date the petition was filed.

Further, the Petitioner has not demonstrated that the Director erred in concluding that its staffing was insufficient to support him in an executive capacity, where he would be primarily relieved the from performing non-qualifying tasks, as of the date the petition was filed. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. A beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

In considering the totality of the record, the evidence does not demonstrate that the Beneficiary was acting in an elevated position within a complex organizational hierarchy and primarily focused on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. As we have already discussed, the Petitioner submitted substantial evidence reflecting the

Beneficiary's daily involvement with stocking the company's proposed vape stores and outfitting them for operation. Further, regardless of later changes to the organizational chart after the date the petition was filed, the organizational chart submitted with the petition claimed that the Beneficiary supervised a sales and operations manager and a business development and finance manager. This chart also indicated that the sales and operations manager oversaw an administrative assistant/vape store manager and that the business development and finance manager supervised as gas station supervisor directing two gas station operators.

However, state employer's quarterly tax and wage reports from the third quarter of 2016 reflected that the Petitioner had only three employees beyond the Beneficiary as of the date the petition was filed; namely the claimed sales and operations manager, the business development and finance manager, and the asserted administrative assistant and vape store manager. Notably, these state tax documents coinciding with the petition did not reflect the claimed gas station manager or its other asserted operational employees. This evidence indicates that the Petitioner employed all managers and no operational level employees to operate its gas station and convenience store and vaping products store leaving substantial uncertainty as to whether there was a level of managers subordinate to the Beneficiary as claimed and whether there were sufficient operational level employees to relieve him from primarily performing the non-qualifying operational level duties. In fact, as noted, the Petitioner notably provided substantial evidence indicating that the Beneficiary was performing these tasks. The Petitioner also appears to have acknowledged a need for operational level employees to run the business, stating that it had initiated the hiring of sales associates and cashiers for the vaping business after the date the petition was filed in January 2017. In sum, this evidence indicates that the Petitioner had not developed sufficiently within one year to support the Beneficiary within a complex organizational hierarchy where he would primarily focus on the broad goals and policies of the organization rather than its day-to-day operations.[4]

For the foregoing reasons, we conclude that we did not act in error in dismissing the Petitioner's previous appeal and that the Director was correct in denying the petition and the subsequent motions. The Petitioner has not shown proper cause for reconsideration and has not overcome our grounds for dismissing its previous appeal. In visa petition proceedings, it is the 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 reconsider is dismissed.

[4] The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the intended U.S. operation one year within the date of approval of the petition to support an executive position. There is no provision in USCIS regulations allowing for an extension of this one-year period. If the business does not have the necessary staffing after one year to sufficiently relieve the Beneficiary from performing operational and administrative tasks, the Petitioner is ineligible for an extension.