U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF F-H-, INC.

DATE: DEC. 14, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, described as a "food, beverages, and dessert" business, seeks to extend the Beneficiary's temporary employment as its president and general manager 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 California Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary will be employed in the United States in a managerial or executive capacity. The Petitioner appealed the denial which we dismissed concurring with the Director's conclusion.

The matter is before us on a motion to reconsider. In its motion, the Petitioner asserts that we misapplied the law and considered facts improperly set forth by its former counsel.[1] We will deny the motion.

[1] The Petitioner does not identify any of the "facts" that its former counsel improperly set forth and thus it is not clear what the Petitioner believes are "improper facts." If the Petitioner is claiming it received ineffective assistance of counsel, we note that the Board of Immigration Appeals (the Board) established a framework for asserting and assessing claims of ineffective assistance of counsel. *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). *Lozada* sets forth certain threshold documentary requirements for asserting a claim of ineffective assistance: (1) a written affidavit of the petitioner attesting to the relevant facts. The affidavit should provide a detailed description of the agreement with former counsel (i.e., the specific actions that counsel agreed to take), the specific actions actually taken by former counsel, and any representations that former counsel made about his or her actions; (2) evidence that the petitioner informed former counsel of the allegation of ineffective assistance and the former counsel was given an opportunity to respond. Any response by prior counsel (or report of former counsel's failure or refusal to respond) should be submitted with the claim; (3) if the petitioner asserts that the handling of the case violated former counsel's ethical or legal responsibilities, evidence that the petitioner filed a complaint with the appropriate disciplinary authorities (e.g., with a state bar association) or an explanation why the petitioner did not file a complaint. *Id.* at 639. Here, the Petitioner did not meet these minimum threshold documentary requirements to support a claim of ineffective assistance of counsel.

I. MOTION REQUIREMENTS

To merit 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 reconsider[2] 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).

II. ANALYSIS

The Petitioner does not offer any legal argument supported by pertinent precedent decisions to establish that our decision on the issue of the Beneficiary's U.S. managerial or executive capacity is in error. The Petitioner disagrees with our interpretation of the term "executive capacity." However, the Petitioner's disagreement appears to arise from a misunderstanding and conflation of the definitions of "managerial capacity" and "executive capacity."[3] These are two distinct definitions and the Petitioner must satisfy the requirements of one or the other definition to establish that the Beneficiary is primarily a managerial employee or primarily an executive employee.

On motion, the Petitioner asserts that while its former counsel "may have not clearly explain[ed] the duties and functions of the Beneficiary," it is clear from the descriptions of duties that the Beneficiary has been and will be managing an essential function. The Petitioner claims that the Beneficiary's main duty is to run the Petitioner's business and that he "was in charge of the most important function of the organization, namely expansion." The Petitioner adds that the expansion duties include "directing functions such as financing, negotiations with franchisors on [a] variety of subjects, dealing [with] municipalities' different departments regarding licensing and permits, dealing with construction[] issues, dealing with state and local health and safety departments and regulations, and the list goes on." First, running the Petitioner's business or performing the functions of the company is not managing an essential function. *See Q Data Consulting, Inc. v. INS*, 293 F. Supp.2d 25, 29 (D.D.C. 2003). Second, the Petitioner's description of the Beneficiary's

[2] The Petitioner has not filed a motion to reopen and does not state any new facts supported by affidavits or other documentary evidence to justify reopening this proceeding. 8 C.F.R. § 103.5(a)(2).

[3] The Petitioner notes that we acknowledge that 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. We also consistently point out that inherent to the definition of "executive capacity," the organization must have a subordinate level of managerial employees for a beneficiary to direct. The Petitioner finds our requirement that the Beneficiary have a subordinate level of managerial employees inconsistent with the statutory definition. Specifically, the Petitioner asserts that our language is inconsistent in that "an executive in its capacity, 'supervises and controls the work of other supervisory professionals, or managerial employees, **or** manages an essential function within the organization or subdivision of the organization'." [Emphasis in original.] However, the statutory definition of "executive capacity" does not include the language "managing an essential function."

"expansion duties" confirms that it is the Beneficiary who performs these duties. The Petitioner does not identify anyone, other than the Beneficiary who will carry out the financing, negotiations with franchisors, obtaining permits and licenses, and dealing with construction issues. As we previously determined, the Petitioner has not established that the Beneficiary will be *primarily* engaged in managerial or 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.

The Petitioner asserts on motion that the Beneficiary is unlike the beneficiary in *Family Inc. v. USCIS*, as the Beneficiary here does not work alongside the employees of its yogurt shop. It also claims on motion that the Petitioner does not have any employees; that it owns two businesses that the Beneficiary must oversee to ensure his investments are successful. We noted in our previous decision that it is common for franchises to require the business owner or its principals to spend a certain number of hours per week on hands-on or first-line supervisory tasks in the store as a condition of the franchise. We further noted that the Petitioner had not provided a copy of its franchise agreement with [redacted] so that the conditions of the franchise could be assessed. The Petitioner has not addressed this concern on motion. Additionally, the record shows that the Petitioner paid the yogurt shop employees and the record does not include probative evidence that the yogurt shop is a separate entity. Thus, contrary to the Petitioner's claim that it has no employees, the record demonstrates that the Petitioner employs the yogurt shop employees. Further, if the Beneficiary's main purpose is to oversee his investments, this is not a primarily managerial or primarily executive duty as set out in the statutory definitions.

The Petitioner has not established that the Beneficiary managed or will manage an essential function. To establish that a beneficiary will manage an essential function, a petitioner must clearly describe the duties to be performed in managing the essential function. In addition, 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." *Matter of G- Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017). Here, the Petitioner has not established that the Beneficiary will manage, as opposed to perform, the duties related to the Petitioner's expansion.

The record on motion to reconsider is insufficient to warrant reconsideration of our decision on this issue. The motion to reconsider does not offer any pertinent precedent decisions to support the Petitioner's assertion that we misapplied the law to the facts presented in this matter.

III. CONCLUSION

For the reasons discussed, the Petitioner has not shown proper cause for reconsidering our decision. The Petitioner has not established eligibility for the benefit sought.

ORDER: The motion to reconsider is denied.

Cite as *Matter of F-H-, Inc.*, ID# 881290 (AAO Dec. 14, 2017)