U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9899606

Date: DEC. 22, 2020

Appeal of Texas Service Center Decision

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

The Petitioner, a franchise and business consulting company, seeks to extend the temporary employment of the Beneficiary as its President and CEO under the L-1A nonimmigrant classification for intracompany transferees.[1] 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 Texas Service Center denied the petition, concluding that the record did not establish that the Beneficiary would be employed in the United States in a managerial or executive capacity under an extended petition. The Director denied a subsequent motion to reopen and reconsider, and the matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. See Section 291 of the Act, 8 U.S.C. § 1361. Upon de novo review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary in a managerial or executive capacity, or in a position requiring specialized knowledge for one continuous year within three years preceding the beneficiary's application for admission into the United States. 8 C.F.R. § 214.2(l)(1). The prospective U.S. employer must also be a qualifying organization that seeks to employ a beneficiary in a managerial or executive capacity. 8 C.F.R. § 214.2(l)(3)(i).

A petitioner seeking to extend an L-1A petition that involved a new office must submit a statement of the beneficiary's duties during the previous year and under the extended petition; a statement

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period August 8, 2016, until August 7, 2017. 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.

describing the staffing of the new operation and evidence of the numbers and types of positions held; evidence of its financial status; evidence that it has been doing business for the previous year; and evidence that it maintains a qualifying relationship with the beneficiary's foreign employer. 8 C.F.R. § 214.2(l)(14)(ii).

II. ANALYSIS

In his July 29, 2019, decision, the Director concluded that the record does not establish that the Beneficiary would be employed in the United States in executive capacity under an extended petition.[2] The Director noted that he would be performing non-qualifying duties, and determined that the Petitioner did not demonstrate that he would be directing the management of the organization. He noted the lack of job descriptions for the Beneficiary's subordinates, despite a specific request for them in a request for evidence (RFE). He stated that the Petitioner's organizational chart depicting the Beneficiary at an elevated position in the company's hierarchy does not match with the Beneficiary's assigned job duties. He noted that the record does not establish what tasks the Beneficiary will perform, how he will function within the organizational hierarchy, and how his subordinates will relieve him of performing non-qualifying tasks.

On motion, the Petitioner asserted that the Beneficiary directs the management of the company and that his duties are primarily executive. It submitted job descriptions for its staff, and asserted that the lengthy period of adjudication for the extension petition has caused a loss of income to its business because clients do not want to do business with the Petitioner if the Beneficiary cannot remain in the United States. It also listed several factors that it asserted should be considered in adjudication of the motion, including the Petitioner's facilitation of foreign investment into the United States; its engagement in Medicaid services; its reputation within the community; the Beneficiary's qualifications; and the fact that the Beneficiary's children are doing well in school.[3]

In his October 23, 2019, motion decision, the Director determined that the evidence submitted on motion to reopen was not "new" evidence pursuant to 8 C.F.R. § 103.5(a)(2).[4] The Director noted that the Petitioner had the opportunity to submit the evidence with the petition and in response to the RFE, and that it did not explain why the evidence was unavailable or unobtainable at the time of the RFE.[5] The Director also determined that the Petitioner's motion to reconsider was not supported by citations to appropriate statutes, regulations, or precedent decisions, and that it did not establish that the prior decision was based on an incorrect application of law or policy pursuant to 8 C.F.R. § 103.5(a)(3).[6] Thus, the Director dismissed the motion because the requirements for filing a motion

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[2] The Petitioner does not claim that the Beneficiary would be employed in a managerial capacity.

[3] It also submitted an organizational chart; employment tax returns; a client list; a chart itemizing loss of business; a letter from the New York Department of Health Services; service agreements between the Petitioner and clients; letters from clients; a letter from a New Jersey government official; pictures; and the Beneficiary's educational credentials.

[4] A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2).

[5] The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(8) and (12). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

[6] A motion to reconsider must establish that the prior 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.

to reopen and reconsider had not been met. At issue on appeal is whether the Director erred in dismissing the motion for failure to meet motion requirements.

On appeal, the Petitioner submits essentially the same brief and evidence that it submitted on motion, with one exception – it asserts that its motion to reopen was incorrectly denied because it submitted "factual information or changed factual circumstances that were not considered and could not have been presented in the initial proceeding." Specifically, it asserts that during the period between the filing of the extension petition and its denial, it "has incurred loss of business income" and has made "significant contributions to the local economy."[7] However, the Petitioner has the burden of proof to establish eligibility for the requested benefit at the time of filing the benefit request and continuing until the final adjudication. See 8 C.F.R. § 103.2(b)(1); see also Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm'r 1971) (providing that "Congress did not intend that a petition that was properly denied because the beneficiary was not at that time qualified be subsequently approved at a future date when the beneficiary may become qualified under a new set of facts."). The Petitioner's appellate assertions do not establish eligibility at the time of filing.

Further, the sole issue addressed in the Director's July 29, 2019, decision was whether the Petitioner established that the Beneficiary will be employed in the United States in an executive capacity.[8] To be eligible for L-1A nonimmigrant visa classification as an executive, the Petitioner must show that the Beneficiary will perform the high-level responsibilities set forth in the statutory definition at section 101(a)(44)(B)(i)-(iv) of the Act. The Petitioner must also prove that the Beneficiary will be primarily engaged in executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. See Family Inc. v. USCIS, 469 F.3d 1313, 1316 (9th Cir. 2006). In determining whether the Beneficiary's duties will be primarily executive, the Director considered the Petitioner's description of the job duties and the company's organizational structure, and he noted the absence of job descriptions for the Beneficiary's subordinates and the Petitioner's failure to demonstrate how the Beneficiary's subordinates will relieve him of performing non-qualifying tasks.

The evidence submitted on motion relating to whether the Petitioner "has incurred loss of business income" and has made "significant contributions to the local economy" during the period between filing the petition and the denial decision is not relevant to the issue of whether the Beneficiary will be employed in the United States in an executive capacity.[9] No "new" facts were submitted on motion to reopen relating to whether the Beneficiary will be employed in the United States in an executive capacity. Thus, the Director did not err in dismissing the Petitioner's motion for failure to meet motion requirements. We will dismiss the appeal for this reason.

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§ 103.5(a)(3). A motion to reconsider must also be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services or Department of Homeland Security policy. Id.

[7] The Petitioner does not additionally assess error to the Director's dismissal of the motion to reconsider.

[8] "Executive capacity" means an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function of the organization; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B) of the Act.

[9] The Petitioner must support its assertions with relevant, probative, and credible evidence. See Matter of Chawathe, 25 I&N Dec. 369, 376 (AAO 2010).

We note that despite the submission of the other employees' job duties on motion and appeal, the description of Beneficiary's duties provided by the Petitioner does not demonstrate that the Beneficiary would primarily perform the high-level responsibilities of an executive.[10] Rather, the description of duties indicates that the Beneficiary would devote the majority of his time to day-to-day functions of the business, such as attending expos, negotiating and executing contracts, researching markets, initiating new projects, enforcing adherence to legal guidelines and in-house policies, securing additional sources,[11] and preparing budget and expense reports. As noted by the Director in his July 29, 2019, decision, the Beneficiary's job description includes numerous duties that fall outside the statutory definition of executive capacity.

Further, the submitted job descriptions for the Petitioner's other employees conflict with the Beneficiary's asserted duties. For example, the Petitioner asserts that it has hired an "Accounts & Finance Head" who prepares financial statements and reports, and a "Customer Care and Operations Manager" who prepares budgets and approves expenditures. It is unclear why the Beneficiary would continue to devote time to "preparing budget and expense reports" when the Petitioner has hired others to handle those duties. The Petitioner also indicates that the Beneficiary will continue to perform human resources tasks, such as hiring and firing staff. However, the Petitioner indicates that it has hired an "HR Head" to handle such duties. Further, the "Accounts & Finance Head" purportedly hires accounting and finance staff, and the "Customer Care and Operations Manager" purportedly recruits, hires, and trains new sales staff. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). It appears that the majority of the Beneficiary's duties under the extended petition will continue to be non-qualifying, operational duties.

The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. Here, although the organizational chart suggests that a subordinate staff is available to perform many non-qualifying operational duties, the Petitioner has not resolved the conflicting duty descriptions or explained why a majority of the Beneficiary's time continues to be devoted to non-qualifying tasks. Accordingly, the Petitioner has not established that he would be employed in the United States in an executive capacity as defined at section 101(a)(44)(B) of the Act.

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[10] The duties include: 40% of his time continuing to attend various expos and negotiate and execute contracts with vendors in the U.S, researching and maintaining a deep knowledge of the company's markets and industry, initiating new projects, and enforcing adherence to legal guidelines and in-house policies; 35% of his time securing additional sources, preparing budget and expense reports, and planning his time to properly communicate these reports to the Board of Directors abroad; and 25% of his time supervising employees, directing personnel administration such as hiring and firing staff, preventing undesired organizational change, sustaining high professional standards, conduct periodic staff evaluations, and overseeing promotions and salary increases.

[11] The record does not define or identify these "new sources." Specifics are an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. 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).

III. QUALIFYING RELATIONSHSIP

Although not addressed by the Director in his decisions, the Petitioner has not established that it has a qualifying relationship with the Beneficiary's foreign employer. To establish a "qualifying relationship," the Petitioner must show that the Beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See section 101(a)(15)(L) of the Act; see also 8 C.F.R. § 214.2(l)(1)(ii) (providing definitions of the terms "parent," "branch," "subsidiary," and "affiliate").

On the extension petition, the Petitioner claimed that it and the Beneficiary's foreign employer, [redacted], in Bangladesh, are affiliates, asserting that each company is owned in the same percentages by the same four shareholders. The record contains no evidence documenting the ownership of the foreign entity, but it does contain four stock certificates showing that the Petitioner is owned in equal shares (50 shares each) by the Beneficiary, [redacted] and [redacted]

However, the Petitioner's 2016 IRS Form 1120, U.S. Corporation Income Tax Return, indicates that the Petitioner is wholly-owned by the Beneficiary, directly contradicting the claim that it is owned in equal shares by four individual shareholders. Further, in a letter supporting the extension petition, former counsel for the Petitioner stated that the Petitioner is a wholly-owned subsidiary of the foreign entity.[12] Consequently, the Petitioner has not established that it has a qualifying relationship with the Beneficiary's foreign employer. 8 C.F.R. § 214.2(l)(1)(ii)(G). For this additional reason, the petition cannot be approved.

ORDER: The appeal is dismissed.

[12] Doubt cast on any aspect of the Petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988).