U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30004633

Date: FEB. 15, 2024

Motion on Administrative Appeals Office Decision

Form I-129, Petition for a Nonimmigrant Worker (L-1A Manager or Executive)

The Petitioner, a provider of high-rise window cleaning services, seeks to temporarily employ the Beneficiary as its chief executive officer (CEO) and vice president 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 the Petitioner did not establish that it would employ the Beneficiary in an executive capacity. We dismissed the Petitioner's appeal. The Petitioner subsequently filed combined motions to reopen and dismiss, which we also dismissed. The matter is now before us on motion to reconsider.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Upon review, we will dismiss the motion.

A motion to reconsider must establish that our 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. § 103.5(a)(3). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit. Our review on motion is limited to reviewing our latest decision. 8 C.F.R. § 103.5(a)(1)(ii).

On motion, the Petitioner contests the correctness of our prior decision, asserting that it contained statements that appear to contradict our findings on appeal. In support of the motion, the Petitioner relies on the statutory definition of executive capacity at section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), and the *USCIS Policy Manual* and asserts that we incorrectly applied the law and policy to the facts presented.[1] The Petitioner maintains that it met its burden to demonstrate that the

[1] The Petitioner also cites to a non-precedent decision and the Foreign Affairs Manual (FAM) in support of its assertions. The cited decision was not published as a precedent and therefore does not bind U.S. Citizenship and Immigration Services (USCIS) officers in future adjudications. *See* 8 C.F.R. § 103.3(c). The FAM is likewise not binding upon USCIS officers.

Beneficiary will primarily perform the high-level executive duties described in the statute. In its brief, the Petitioner enumerates five separate issues as points of contention with our prior decision, which we will address in turn below.

First, the Petitioner asserts that it provided new evidence in support of its prior motion to reopen which should have been sufficient to resolve any concerns regarding the Petitioner's staffing levels. Specifically, the Petitioner asserts that it submitted copies of IRS Forms 1099-NEC issued to its staff in 2022 which were previously unavailable, and that it did so because our appellate decision specifically noted the lack of evidence of payments made to workers in 2022.

In dismissing the motion to reopen, we acknowledged this evidence and the fact that IRS Forms 1099 for 2022 were not available earlier in the proceeding. However, we determined that this evidence was insufficient to warrant reopening because any previous evidentiary deficiency related to the Petitioner's staffing was not a principal basis for dismissal of the appeal. With the current motion, the Petitioner questions how we could state "there was little evidence of payment to workers in 2022," but we did not make this statement in our decision dismissing its motion to reopen. Rather, we concluded that the newly submitted Forms 1099-NEC could not overcome the dismissal of the appeal and therefore did not show proper cause for reopening. *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (requiring that new evidence have the potential to change the outcome).

The second issue raised by the Petitioner relates to the following passage from our prior decision:

> In our appellate decision, we stated "it is appropriate 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-managerial or non-executive operations of the company." On motion, the Petitioner objects to the term "absence of employees" because the Petitioner has lower-level workers (contractors rather than employees) who perform various operational tasks. We did not state that the Petitioner has no support staff. Rather we concluded that the Petitioner had not shown that its staff is sufficient to allow the Beneficiary to work in a primarily executive capacity.

On motion, the Petitioner maintains that it does in fact have workers that perform the non-managerial or non-executive operations of the company and that our reference to an "absence" of workers was incorrect and implied the company was not staffed. A review of our prior decisions does not support the Petitioner's suggestion that we erroneously determined the company has no support staff to carry out any operational activities or that we based the prior decisions on such a finding. For example, in dismissing the appeal, we considered the job descriptions submitted for the Beneficiary's direct subordinates (a supervisor and an operations assistant), found that they were not clearly written, and explained that we could not determine to what extent they would relieve the Beneficiary from involvement in the day-to-day operational and administrative activities of the company. The evidence submitted in support of the prior motion to reopen did not clarify the job duties performed by subordinate staff. Further, it showed that the individual contracted to work as an operations assistant

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See, e.g., *Avena v. INS*, 989 F. Supp. 1, 8 (D.D.C. 1997); *Matter of Bosuego*, 17 I&N Dec. 125, 128 n.3 (BIA 1979). The FAM provides guidance to employees of the Department of State in carrying out their official duties, such as the adjudication of visa applications abroad.

earned only $11,000 in 2022 despite the Petitioner's claim that it pays her $24,000 annually, thereby suggesting she provided services on only a part-time basis. Finally, as discussed further below, our conclusion that the Petitioner did not meet its burden to demonstrate that the Beneficiary would perform primarily executive duties was based on several factors and not solely on evidence related to the company's staffing levels and subordinate workers.

The Petitioner also questions why our prior decision mentions that its workers are "contractors rather than employees," noting that the *USCIS Policy Manual* specifically states that "there must be sufficient staff (e.g. contract employees or others) to perform the day-to-day operations of the petitioning organization in order to enable the beneficiary to be primarily employed in the executive function." *See generally*, 2 *USCIS Policy Manual* L.6(D), https://www.uscis.gov/policy-manual/volume-2-part-l-chapter-6 (discussing application of the statutory definition of "executive capacity" in L-1 adjudications). The Petitioner asserts that "the fact that [the Beneficiary] will supervise contractors does not disqualify him as an executive," and states it "can't understand the AAO's statement of 'contractors rather than employees.'"

The Petitioner does not point to any language in our prior decision supporting its suggestion that we concluded that the Beneficiary's supervision of independent contractors would "disqualify him as an executive." Our statement that the Petitioner's staff are contractors rather than payroll employees was a factual observation supported by the evidence of record and did not form the basis of our decision. The Petitioner has not shown that we incorrectly applied the law or USCIS policy by acknowledging that its staff are paid as independent contractors.

The Petitioner's three remaining arguments on motion relate to our previous determination that the Beneficiary would, more likely than not, be engaged in sales and marketing functions that do not fall within the statutory definition of executive capacity. We emphasized that the record did not show its existing staff would perform non-executive tasks associated with these functions. We also noted that the Petitioner could not rely on the staffing projections in its business plan, specifically, its plan to hire a marketing manager within one or two years of filing the petition. *See* 8 C.F.R. § 103.2(b)(1) (requiring a petitioner to meet all eligibility requirements at the time of filing the petition).

The Petitioner now asserts that we overlooked the fact that any marketing-related functions performed by the Beneficiary would require only 20 percent of his time and therefore should not preclude a determination that his duties would be primarily executive in nature. However, we specifically acknowledged the Petitioner's submission of a job description which states the Beneficiary would spend 20 percent of his time contacting potential clients and partners and generating new contacts and business opportunities:

> Although the Petitioner indicated that these duties, which relate to promoting, marketing, and selling the company's services, would require only 20 percent of his time, it simultaneously stated that "much" of his time would be spent on these responsibilities once he completed his market analysis and developed strategies for growth alongside the company's president. While we do not doubt that the Beneficiary will have authority to finalize contracts and agreements with new customers and partners, it is unclear who, other than the Beneficiary, would be responsible for

operational activities associated with the sales and marketing of the Petitioner's services.

Therefore, we did not, as claimed in the current motion, overlook the percentage of time the Petitioner assigned to the Beneficiary's marketing related responsibilities, or reach a conclusion that his performance of non-executive marketing functions would automatically preclude him from being classified as an L-1A executive.

Rather, we reviewed the position description as a whole and explained why the Petitioner did not meet its burden to establish the Beneficiary's duties would be primarily executive in nature. For example, we noted that the Petitioner indicated that the Beneficiary would spend 50 percent of his time analyzing market opportunities in the United States, analyzing the local competition, and analyzing opportunities to introduce new services. However, we found that, based on the multi-year business plan in the record, it appeared that the Beneficiary had already completed the necessary analyses, identified strategies for growth, and developed a plan to implement them, thus raising questions about how much time the Beneficiary would reasonably need to spend on these responsibilities on an ongoing basis. The Petitioner has not addressed this issue on motion.

In addition, we previously emphasized that the Petitioner did not clarify how the Beneficiary's claimed responsibility for the overall direction of the company, and implementation of its strategies and goals, would be shared with the company's current president and "head of operations," whose duties have not been described in the record. Again, the Petitioner has not attempted to address this issue in either of its motions. Rather, the Petitioner continues to assert that the Beneficiary would allocate 80 percent of his time to executive duties based on the job description submitted at the time of filing, the deficiencies of which were discussed at length in our dismissal of the appeal.

Our conclusion that the Petitioner did not establish that the Beneficiary would perform primarily executive duties was based, in part, on the deficiencies of the submitted position description. However, it was not narrowly grounded on a determination that he would be performing sales and marketing functions, as the Petitioner claims on motion. Instead, we concluded that the Petitioner, despite indicating that the Beneficiary's duties will be primarily or even wholly executive in nature, did not submit a position description sufficient to support that claim.

The Petitioner nevertheless maintains that it has "widely explained the beneficiary . . . will perform certain high-level duties, which it is acknowledge [sic] by the AAO." We acknowledged that the Beneficiary, as an owner and CEO of the company, will have authority to establish the goals and policies of the organization, exercise wide latitude in discretionary decision making and receive only general supervision from the board of directors, as required by section 101(a)(44)(B)(ii)-(iv) of the Act. However, we explained why the evidence was insufficient to demonstrate he would *primarily* perform duties consistent with the statutory definition.

Further, as emphasized in our prior decision, executive capacity involves more than high-level control over all or part of an organization. The statutory and regulatory definition of "executive capacity" requires the executive to direct the management of the organization or a major component or function thereof. Section 101(a)(44)(B)(i) of the Act. An executive directs the management of the organization, major component, or essential function of a given organization by controlling the work

of managerial or lower-level executive employees. This control could either take the form of direct supervision of those managers or executives or could be more indirect under some circumstances. *See generally* 2 *USCIS Policy Manual*, *supra*, at L.6(D).

The only positions subordinate to the Beneficiary's proposed position are a first-line supervisor of window cleaners, and an operations assistant who, at the time of filing, received compensation commensurate with part-time work. The Petitioner has not established that these two individuals are "managerial or lower-level executive employees," such that the Beneficiary's authority over them would constitute directing the management of the organization or a major component or a major function thereof. On motion, the Petitioner mentions that the Beneficiary has "two tiers" of employees subordinate to his position but does not contest our determination that the supervisor and operations assistant are neither managerial nor executive employees.

Finally, the Petitioner's brief emphasizes the Beneficiary's education, professional experience, and recognition he has received as an entrepreneur in his native country and is accompanied by copies of previously submitted evidence related to his qualifications. The Petitioner maintains that he is well-qualified for the offered position and his role is essential to its plans for expansion. Under 8 C.F.R. § 214.2(l)(3)(iv), a petitioner is required to provide evidence that the individual's prior education, training and employment qualifies them to perform the intended services in the United States. However, we note that neither the denial of the underlying petition nor our decisions on appeal or motion were based on a finding that this regulatory requirement was not met.

For the reasons discussed, the Petitioner has not established that our previous decision was based on an incorrect application of law or policy at the time we issued our decision. Therefore, the motion to reconsider will be dismissed. 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reconsider is dismissed.