U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-O- LLC

DATE: JAN. 10, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, which sells digital equipment for outdoor use, seeks to extend the Beneficiary's temporary employment as its director 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, Vermont Service Center, denied the petition. The Director concluded that the evidence of record did not establish that the Beneficiary will be employed in the United States in an executive capacity. We dismissed the Petitioner's appeal from that decision.

The matter is now before us on a motion to reopen and a motion to reconsider. On motion, the Petitioner submits documentation of the company's recent growth and asserts that we erred because our decision is inconsistent with case law that acknowledges a company with few employees can have executive leadership.

We will deny the motion to reopen and the motion to reconsider.

I. MOTION REQUIREMENTS

The regulation at 8 C.F.R. § 103.5(a)(1)(i) limits our authority to reopen the proceeding to instances where the Petitioner has shown "proper cause" for that action. Thus, to merit reopening, a petitioner must not only 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), but also show proper cause for granting the motion. We cannot grant a motion that does not meet applicable requirements. *See* 8 C.F.R. § 103.5(a)(4).

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. A motion to reconsider must, when filed,

also 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).

For the reasons to be discussed below, we find that the new evidence submitted on motion does not overcome the dismissal or establish that the petition should be approved. Therefore, the Petitioner has not shown proper cause to reopen the proceeding.

Furthermore, we find that the Petitioner has not established that our decision was based on an incorrect application law or USCIS policy, or that our decision was incorrect based on the evidence of record at the time of that decision. Therefore, the Petitioner has not shown proper cause for reconsideration.

II. LAW

To establish eligibility for the L-1 nonimmigrant visa classification, a qualifying organization must have employed the Beneficiary in a managerial or executive capacity, or in a specialized knowledge capacity, for 1 continuous year within 3 years preceding the Beneficiary's application for admission into the United States. In addition, the Beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity. Section 101(a)(15)(L) of the Act.

A petition filed on Form I-129, Petition for a Nonimmigrant Worker, shall be accompanied by:

> (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
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> (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
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> (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
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> (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

8 C.F.R. § 214.2(l)(3). A visa petition that involves the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and

(E) Evidence of the financial status of the United States operation.

8 C.F.R. § 214.2(l)(14)(ii).

III. ANALYSIS

We dismissed the appeal based on a finding that the Petitioner did not establish that it will employ the Beneficiary in an executive capacity. On appeal, the Petitioner did not claim that it would employ the Beneficiary in a managerial capacity.

The term "executive capacity" means "an assignment within an organization in which the employee primarily:"

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) 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, 8 U.S.C. § 1101(a)(44)(B). If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

A. Motion to Reopen

The Petitioner moves to reopen the petition so that we can consider evidence of the company's recent growth. This evidence includes:

- A copy of a commercial lease agreement for retail space, valid from August 1, 2016 through July 31, 2019;
- Interior photographs of the rental property, showing renovations in progress;
- Copies of pay receipts from July and August 2016, showing the Petitioner's employment of three subordinates below the Beneficiary, at least two of whom the Petitioner hired in 2016; and
- Receipts showing two payments (of $322.50 and $40.00) to an accounting firm in July 2016.

The above evidence indicates that the Beneficiary had three subordinates in August 2016, whereas he had only one subordinate when the Petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on October 1, 2015. It also shows that the Petitioner, which originally sold its products exclusively online, was preparing to open a brick-and-mortar retail store.

All of the newly submitted evidence concerns developments that occurred after the petition's filing date. The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit throughout the adjudication. *See* 8 C.F.R. § 103.2(b)(1). We cannot approve a visa petition at a future date based on new facts that did not apply at the time of filing. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).

Because the newly submitted evidence does not establish eligibility at the time of filing, the Petitioner has not shown proper cause to reopen the proceeding. We will therefore deny the motion to reopen.

B. Motion to Reconsider

When the Petitioner filed the Form I-140 petition on October 1, 2015, it had two U.S. employees, one of which was the Beneficiary. Additional procedural information regarding the initial adjudication and denial of the petition appear in our appellate decision, issued August 1, 2016. We need not repeat this information in detail here, because this decision is not a *de novo* readjudication of the appeal or the underlying petition.

In our dismissal notice, we found that, while the Beneficiary has executive-level responsibilities, the Petitioner had not shown that the Beneficiary's daily duties are primarily those of an executive. Instead, we concluded that the Beneficiary, aided by only one subordinate employee, had to perform a substantial number of non-qualifying operational and administrative tasks to run the business.

We acknowledged the Petitioner's assertion that contractors relieve the Beneficiary from performing many key functions, but we found that the Petitioner had not submitted sufficient evidence to substantiate that claim. We noted that the record showed minimal payments to the identified contractors, and that the Petitioner had submitted inconsistent information regarding the remuneration paid to the Beneficiary's only subordinate employee.

On motion, the Petitioner states that the dismissal of the appeal was inconsistent with *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016). The Petitioner asserts that the facts of the case in the adopted decision are "strikingly similar to the instant case in several ways." Most significantly, the Petitioner states that both companies have about the same number of employees; about the same revenues; and receive operational support from their overseas parent companies.

The Petitioner states: "the notion that every executive must necessarily have immediate reports that are managerial employees themselves is not supported by the law." To support this assertion, the Petitioner cites section 101(a)(44)(C) of the Act, which requires us to take the organization's reasonable needs into account when considering its staffing levels.

While the statute grants petitioners some flexibility with respect to staffing, it also plainly states that we can take staff size into consideration within certain parameters. Furthermore, while the definition of a manager differentiates between a personnel manager (who oversees managers, supervisors, and/or professionals) and a function manager (who oversees an essential function), the statute provides no such distinction for executives. The statutory language at section 101(a)(44)(B)(i) of the Act requires a showing that the beneficiary primarily directs the management of either the entire organization or a major component or function of that organization. This management might not consist of onsite managers who report directly to the executive, but nevertheless the burden is on the Petitioner to establish that there is some management structure, whether onsite or elsewhere, over which the Beneficiary has executive authority.

On motion, the Petitioner does not say how our prior discussion was factually or legally deficient. The Petitioner again cites *Z-A-*, regarding a beneficiary's reliance on employees of the foreign company. That decision, however, noted the submission of "substantial evidence relating to the support provided by the overseas staff." See *id.* at 6. The Petitioner, on motion, notes its prior submission of an organizational chart, but does not identify any "substantial evidence" that we overlooked relating to its own case. The Petitioner also cites *Brazil Quality Stones v. Chertoff*, 531 F.3d 1063 (9th Cir. 2008). That decision, however, focused specifically on elements of the definition of a function manager, rather than an executive.

The Petitioner bases the motion on the proposition that a small staff can relieve a beneficiary from performing primarily operational tasks. This is true, but it is not enough for the Petitioner to make this general argument. The burden remains on the Petitioner to show how its own staff accomplishes this with respect to the Beneficiary. The Petitioner states that its operating manager relieves the Beneficiary from having to perform operational duties. In our appellate decision, we noted that the Petitioner did not hire the operating manager until after the petition's filing date, and we cited *Matter*

of Michelin Tire, 17 I&N Dec. 248, to explain why that hiring could not establish eligibility as of the filing date. At the time of filing, the Beneficiary had only one subordinate employee, identified as a "field tester and social media expert." Also, in our dismissal notice, we noted evidence "reflecting the Beneficiary's involvement in operational matters, including order processing and client recruitment." The Petitioner does not address these key points on motion.

The Petitioner states: "Evidence was presented as regards exactly how a significant part of the day to day duties is also performed by outside vendors." The Petitioner also states that we did not take into account "the duties performed by the foreign staff." The Petitioner does not elaborate on either of these points. To warrant reconsideration on motion, the Petitioner must identify specific errors of fact or law. Here, the Petitioner has simply stated that the record does not support our conclusions. This general statement does not compel us to readjudicate the appeal or the underlying petition, already discussed in earlier decisions.

Our dismissal notice addressed both of the above issues:

> [T]he Petitioner submits little evidence to substantiate that these asserted independent contractors are substantially engaged in relieving the Beneficiary from the performance of non-qualifying tasks. The Petitioner asserts on appeal that it has submitted substantial supporting evidence to corroborate its engagement of independent contractors, but we do not agree. The Petitioner has only submitted evidence to indicate that it pays nominal fees to use certain websites for sales and merchant fees to online sellers such as Amazon, eBay, and Paypal. However, the engagement of these online services does not demonstrate that the Beneficiary has been relieved from non-qualifying tasks inherent to managing these sales or sites.
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> The Petitioner provides no evidence of its employees or independent contractors performing the day-to-day tasks of the business, including the asserted web development and graphic design employee directly employed by the foreign entity or the asserted CPA and financial advisor. The Petitioner's use of some shipping vendors, such as USPS and UPS, is not sufficient to establish that the Beneficiary is primarily relieved from operational tasks, nor is the occasional engagement of attorneys or a janitor employed by its lessor.

The Petitioner has not shown any defects in the reasoning of the quoted passage. The Petitioner's interaction with contractors and third-party service providers is not, on its face, evidence of the Beneficiary's executive authority over the management of those companies or major components or functions thereof. A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof, particularly when supporting documentary evidence would reasonably be available. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing Matter of Treasure Craft of Cal., 14 I&N Dec. 190 (Reg'l Comm'r 1972)); *see also Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376.

For the reasons discussed above, the Petitioner has not established that our prior decision was based on an incorrect application of law or USCIS policy, or that our decision was incorrect based on the evidence of record at the time of that decision. Therefore, the Petitioner has not shown proper cause for reconsideration of our appellate decision.

IV. CONCLUSION

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of S-O- LLC*, ID# 149555 (AAO Jan. 10, 2017)