U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12615357

Date: JAN. 14, 2021

Motions on Administrative Appeals Office Decision

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

The Petitioner, a full-service construction and design concept company, seeks to continue the Beneficiary's temporary employment as its president and chief executive officer under the L-1A nonimmigrant classification for intracompany transferees. Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

The Director of the California Service Center denied the petition concluding that the Petitioner did not establish that the foreign employer was doing business as required by the regulations. We withdrew the Director's decision and remanded the matter for the entry of a new decision. The Director issued a decision concluding that the Petitioner did not establish that the Beneficiary would be employed in a managerial or executive capacity in the United States. We dismissed the Petitioner's appeal and the matter is now before us on a combined motion to reopen and reconsider.

The Petitioner bears the burden of establishing eligibility for the requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will dismiss the motions.

I. MOTION REQUIREMENTS

To merit reopening or reconsideration, a petitioner must 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), and show proper cause for granting the motion. 8 C.F.R. § 103.5(a)(1).

A motion to reopen is based on factual grounds and must (1) state the new facts to be provided in the reopened proceeding; and (2) be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider is based on legal grounds and must (1) state the reasons for reconsideration; (2) 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

A. Motion to Reopen

On motion, the Petitioner submitted evidence to support that the Beneficiary's position would be considered an executive position. The Petitioner submits two opinion letters, an updated business plan, pictures of the completed projects the Petitioner started working on when the petition was filed, documentation for current projects, tax documents, and a current organizational chart.

The motion does not meet the requirements of a motion to reopen. The documents submitted in support of the motion to reopen contain information regarding the Petitioner after the date the initial petition was filed. For example, the opinion letters were written by individuals that reviewed the Petitioner's current operations, the business plan is an "updated" plan to reflect the business since the petition was filed, and the current projects and organizational chart all reflect the Petitioner's operations after the petition was filed. A visa petition may not be approved based on speculation of future eligibility or after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Here, the Petitioner has not submitted documentary evidence specific to whether the Beneficiary would act in an executive capacity; as such, it has not met the requirements of a motion to reopen. Therefore, the motion to reopen is dismissed.

B. Motion to Reconsider

The motion does not meet the requirements of a motion to reconsider. The Petitioner asserts that the "AAO has overlooked the evidence provided by the Petitioner in support of Beneficiary's duties as an 'executive' for the Petitioner." However, the Petitioner has not set forth sufficient reasons to demonstrate that our previous dismissal 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).

The Petitioner states that although it is a "small design-build and construction company employing 6 individuals in varying capacities, the size of Petitioner's business is not indicative of its needs for an Executive such as the Beneficiary." The Petitioner also asserts that we used staffing levels in determining the nature of the proposed employment without considering the organization's needs in light of its purpose and developmental stage. *See* section 101(a)(44)(C) of the Act. The Petitioner correctly indicates that we cannot determine the managerial or executive nature of an offered position based solely on the number of employees the position would supervise or direct. But "size is nevertheless a factor" in assessing whether a company's operations are substantial enough to support a manager or an executive. *Brazil Quality Stones, Inc. v Chertoff*, 531 F.3d 1063, 1070 (9th Cir. 2008).

The Petitioner explains that it hired many employees a month before filing the current petition, and just entered into design projects, and thus, the "Company's growth requires the Beneficiary's expertise in the design build and construction industry to move it forward." In addition, the Petitioner contends that in this type of industry "there are multiple layers of employment," and the Petitioner "engages hundreds of contractors and subcontractors in any given project."

The Petitioner explained that it contracts with multiple subcontractors and "hires at least 100 subcontractors of varying professional capacities such as architectural, engineering, electrical, plumbing and many many more." The Beneficiary is "employed at the highest position within the organization" and will be using his "expertise in the construction industry to ensure that the Petitioner is a successful enterprise, building the company's reputation and relationship within the industry and providing the guidance necessary." Although the Petitioner on motion states that it has contractual employees in the areas of architecture, engineering, electrical and plumbing, the Petitioner has not presented evidence to document the existence of these employees or identified in detail the services they provide. The Petitioner has also not explained how the services of the contracted employees relieve the Beneficiary from performing non-qualifying duties related to the provision of goods and services. 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. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

In addition, the Petitioner states that "the actual implementation of duties will be carried out by his VP/COO, General Manager and other managers as per the organization chart and the job descriptions previously provided." However, at the time the petition was filed, the Petitioner did not employ a general manager. Thus, it appears that this is a development that happened after the petition was filed. The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1).

As noted in our previous decision, the Petitioner has not submitted sufficient evidence to establish that the Beneficiary would act within a complex organizational hierarchy as of the date the petition was filed. For example, although the Petitioner submits an organizational chart including several subordinate managers, it also submitted a 2017 IRS Form 1120, U.S. Corporation Income Tax Return indicating that it earned $115,556 in revenue and paid only $46,774 in salaries and wages during that year.[1] On motion, the Petitioner contends that the salaries paid in 2017 were lower because it hired many employees a month before filing the petition. The Petitioner did not explain how the Beneficiary was acting in an executive capacity at the time of filing the petition when it just hired employees one month prior.

The Petitioner submits 2018 IRS Form 1120, U.S. Corporation Income Tax Return, indicating that it paid $158,000 in salaries. However, upon review of the business plan, it stated the positions and salaries for year one as follows: CEO ($60,000), COO ($38,000), Office Manager ($32,000), Procurement Manager ($35,000), Electrical Engineer ($42,000), Construction Manager ($32,000), and Superintendents ($30,000). Based on these salaries, the Petitioner would need to pay at a minimum of $269,000 a year which is much higher than the $158.000 paid in salaries in 2018. In addition, the

[1] The petition was filed on November 22, 2017.

tax forms do not indicate any payment made to subcontractors. The Petitioner must resolve inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 582, 591-92.

In sum, the preponderance of the evidence indicates that the Petitioner was not sufficiently operational and that it did not have adequate staffing as of the date the petition was filed 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. 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).

On motion, the Petitioner asserts that even if the "AAO determines that some of the listed duties that the Beneficiary would perform seem to be non-qualifying, the vast number of duties are in fact executive in nature." The Petitioner also states that the AAO pointed out non-qualifying duties the Beneficiary will perform and was "laser focused on a few duties that were taken out of context." The Petitioner's claim does not overcome the concerns presented in our previous decision. As noted in that decision, the Petitioner provided little detail or documentation to substantiate the financial goals and milestones the Beneficiary would set, the short or long term goals he would develop, the internal processes he would setup for his claimed managers, the policies and procedures he would create and revise, or the expansion of the "U.S. investment" he would formulate. Likewise, as noted in our decision, the Petitioner did not detail or document the plans the Beneficiary would implement to ensure the company's profitable operations, the "innovative solutions to streamline existing operations and processes" he would develop, the significant decisions he would make, the trade and consumer marketing strategies he would put in place, or the management metrics he would maintain.

The Petitioner has not shown that our appellate decision contained errors of law or policy, or that the decision was incorrect based on the record at the time of that decision. Therefore, the motion does not meet the requirements of a motion to reconsider and it must be dismissed.

III. CONCLUSION

For the reasons discussed, the Petitioner has not shown proper cause for reopening or reconsidering the previous decision or otherwise established eligibility for the immigrant benefit sought. In visa petition proceedings, it is a 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 reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.