U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19955530

Date: JAN. 19, 2022

Motion on Administrative Appeals Office Decision

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

The Petitioner, an owner and operator of a retail grocery store, seeks to temporarily employ the Beneficiary as the general manager and chief executive officer (CEO) of its new office under the L-1A nonimmigrant classification for intracompany transferees.[1] Section 101(a)(15)(L) of the 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. The Director questioned the Petitioner's eligibility to file a "new office" petition on behalf of the Beneficiary, noting that an affiliate of the Petitioner, which operated the same retail establishment, had previously employed the Beneficiary under another L-1A new office petition.[2] The Director further determined that the Petitioner did not establish that it would employ the Beneficiary in a managerial or executive capacity within one year. We dismissed the Petitioner's subsequent appeal, concluding that it was not eligible to file a "new office" petition on the Beneficiary's behalf. The matter is now before us on a motion to reconsider.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon review, we will dismiss the motion to reconsider.

I. MOTION REQUIREMENTS

A motion to reconsider must (1) state the reasons for reconsideration and establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy, and (2) establish that the decision was incorrect based on the evidence in the record of proceedings at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). The regulation at 8 C.F.R. §

[1] The term "new office" refers to an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation no more than one year from the date of approval of the petition to support an executive or managerial position.

[2] The record reflects that the Petitioner's affiliate, [redacted], filed a new office petition on the Beneficiary's behalf which was approved and valid from November 16, 2016 until October 31, 2017. The affiliate's petition to extend that petition was denied by the Director of the California Service Center and we dismissed its subsequent appeal of that decision on August 9, 2018. The Petitioner in this matter was incorporated on August 15, 2018. Both U.S. entities are wholly owned by the same foreign parent company.

103.5(a)(1)(i) limits our authority to reopen or reconsider to instances where the Petitioner has shown "proper cause" for that action. Thus, to merit reopening or reconsideration, a petitioner must not only meet the formal filing requirements (such as 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).

II. ANALYSIS

The issue in this matter is whether the Petitioner has established that our decision to dismiss its appeal was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy based on the evidence in the record at the time of our decision.

A. Background and Prior AAO Decision

As noted, we dismissed the Petitioner's appeal based on a determination that it was not eligible to file a "new office" petition on behalf of the Beneficiary. We emphasized that he had previously been the Beneficiary of a new office petition filed by the Petitioner's affiliate, which was given one year to reach a stage of development where it could support an L-1A manager or executive. At the end of that one-year period, the affiliate filed a petition to extend the Beneficiary's status and the Director denied the petition. We dismissed the subsequent appeal because the petitioner in that matter had not established that it was able to support the Beneficiary in a managerial or executive petition at the end of that one-year period. *See* 8 C.F.R. § 214.2(l)(14)(ii) (providing requirements for extending an L-1 petition that involved a new office).

The Petitioner was incorporated in August 2018, one week after we dismissed the affiliated entity's appeal of the new office extension denial. It filed the instant petition in October 2018, indicating that was a "new establishment" and would be operating a retail grocery store at the same [redacted] California location as its U.S. affiliate, but it made no reference to the affiliate in its supporting letters or its business plan.[3] At the time of filing, it indicated on the Form I-129, Petition for a Nonimmigrant Worker, that it had no employees and no income. In response to a request for evidence (RFE), a letter from the foreign entity's general manager explained that it was the parent company's intent that the Petitioner "would take over the whole business from [the] former subsidiary and [that it] would be located at the same address," with plans to reopen the store in November 2018. Documentation submitted in response to the RFE indicated that the Petitioner had in fact already taken over the operations of the Beneficiary's previous L-1A employer as of October 2018 and employed many of the same workers in the same positions, which led the Director to question the Petitioner's eligibility to file as a "new office."

In dismissing the Petitioner's appeal, we determined that the regulations governing new office petitions and new office extensions at 8 C.F.R. § 214.2(l)(3)(v) and (l)(14)(ii), when read together, "reflect that there is no provision for providing another full year of L-1A eligibility under the terms of a new office petition" to the same beneficiary. We disagreed with the Petitioner's reasoning that a

[3] As noted in our prior decision, public records of the California Secretary of State indicated that the affiliated entity that filed the previous L-1A petition on behalf of the Beneficiary [redacted] was dissolved on [redacted] 2018.

new legal entity established for the purpose of taking over a related entity's operations should qualify as a "new office," noting that allowing such new office filings would allow an organization to continually create new legal entities to operate the same business until it became sufficiently operational to support a beneficiary in a managerial or executive capacity. We also emphasized that the regulation at 8 C.F.R. § 214.2(l)(3)(v), relating to new office petitions, refers to a "new office" and a "new operation," rather than a new petitioner or legal entity, and plainly indicates that a new office is one that is not yet open or one that is newly opened. The "operation" in this matter, a retail grocery business, had been operated by the Petitioner's affiliate for more than one year at the time this petition was filed.

As such, we concluded that the evidence clearly reflected that the Petitioner's intent was not to launch a new office or operation in the United States. Rather, it sought to continue its parent company's previous attempt to establish the same grocery business, using a different, newly establish legal entity, following the denial of the new office extension petition filed by its affiliate. We dismissed the appeal based on a determination that the applicable regulations do not afford the foreign company another opportunity to seek a new office petition on behalf of the same beneficiary with respect to the same operation, regardless of the petitioner.

B. Motion to Reconsider

On motion, the Petitioner argues that it was "legally incorrect" for USCIS to reach a conclusion that "two companies with the same employees and same business address are the exact same thing." In this regard, the Petitioner maintains that "whether Company A is the same as Company B depends on whether they have the same federal tax ID."

The Petitioner also contends that, based on the definition of "new office" and the circumstances of this case, its "only choice" as a newly formed corporation was to indicate on the Form I-129 that it was filing under the new office regulations. The Petitioner states that its parent company "decided to start a new office with the intent to franchise the business," and that the new company established in 2018 "has a different business model and purpose," noting that having a new company with no potential liabilities was essential to its plan to attract potential franchisees. The Petitioner argues that the focus should have been on whether it met its burden to establish that it would support a managerial or executive position within one year. The Petitioner claims that it met this burden because it was able to show that it was already staffed and generating a profit immediately after it was established.

Finally, the Petitioner maintains that our prior decision incorrectly "implies that a foreign parent company can only open ONE new office." In this regard, the Petitioner mains that "[a] big company who wants to move to the U.S. market sometimes opens more than one "new office" in different cities at the same time."

Upon review, the Petitioner has not demonstrated that we incorrectly applied the law or USCIS policy in dismissing its appeal or that our decision was incorrect based on the evidence before us at the time of our decision.

The Petition, through counsel, claims for the first time on appeal that it was established for the purpose of operating as a franchisor of Asian grocery stores and therefore has a different business model than

its previous affiliate. Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations. Here, counsel's claim that the Petitioner has a different business model and purpose than its former affiliate is not supported by the business plans or by the previously submitted letters from the Petitioner and its foreign parent company, which do not mention any franchise plans. In contrast, there is ample evidence that the Petitioner was established for the purpose of continuing to operate a [redacted] California grocery store known as '[redacted]' that was previously operated by its affiliate, [redacted], after that entity's attempt to extend the Beneficiary's L-1A status was unsuccessful. A letter from the foreign parent company stated that it was intended that the Petitioner "would take over the whole business from [the former subsidiary]" and continue operating the same retail store.

With respect to the Petitioner's assertion that it and its former affiliate are separate legal entities with separate tax identification numbers, a review of our prior decision demonstrates that we did in fact acknowledge that the current L-1A petitioner and the prior L-1A petitioner [redacted] are not the same legal entity. We emphasized however, that despite being separate entities, they were established by the same foreign parent company for the purpose of managing the same "new operation" (a grocery store) at the same location and with the same employees. Given that [redacted] had already been granted one year to develop the new operation and did not meet its burden to establish that the operation could support the Beneficiary in a managerial or executive capacity at the end of that one-year period, we concluded that the parent company had exhausted its opportunity to launch that specific operation under the "new office" regulations. The Petitioner has not claimed that we erred in determining that the applicable L-1 regulations do not afford the foreign company another opportunity to seek a new office petition on behalf of the same Beneficiary with respect to the same "new operation," regardless of the petitioning entity. Instead, as noted above, the Petitioner now argues that it has a different business model than its former affiliate, a claim that is not supported by the record.

Finally, the Petitioner maintains that we incorrectly implied that a foreign company is limited to filing only one L-1A new office petition, providing as an example, a scenario in which a large foreign company may simultaneously seek to open multiple new offices in new cities and file petitions to staff each office with a different L-1A intracompany transferee. We reached no determination regarding circumstances in which an organization may be able to successfully file multiple L-1A new office petitions on behalf of different beneficiaries who would be working in separate locations for different new operations, as such a scenario was not before us on appeal. The scenario described by the Petitioner is significantly different from the facts presented here. In this case, the foreign entity sought to avail itself of the new office provisions for the same business operation and same beneficiary twice by incorporating a new entity to serve as the Beneficiary's new L-1A employer after the first L-1A petitioner was unable to meet the requirements for an extension of the petition under 8 C.F.R. § 214.2(l)(14)(ii).

Although the Petitioner disagrees with our determination that it was ineligible to file this petition as a "new office," for the reasons discussed above, it has not demonstrated that we incorrectly applied the law or USCIS policy in reaching that determination. Accordingly, the motion to reconsider will be dismissed. Further, because, the Petitioner has not overcome our basis for dismissing the appeal, we

need not address the separate issue of whether it established that it would employ the Beneficiary in a managerial or executive capacity.

ORDER: The motion to reconsider is dismissed.