U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-E-C-, INC.

DATE: JULY 12, 2019

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a cash exchange service, seeks to continue the Beneficiary's temporary employment as president and chief executive officer (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 Vermont Service Center denied the petition, concluding that the record did not establish, as required, that the Petitioner would employ the Beneficiary in a managerial or executive capacity. We summarily dismissed the Petitioner's appeal because the record contained no substantive statement or evidence to contest the denial of the petition. The matter is now before us on a motion to reopen and reconsider. On motion, the Petitioner asserts that we disregarded a properly submitted supplement to the appeal.

We will deny both motions.

I. MOTION REQUIREMENTS

A motion to reopen is based on documentary evidence of *new facts*, and a motion to reconsider is based on an *incorrect application of law or policy*. We will discuss the requirements of each type of motion below. We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

The regulation at 8 C.F.R. § 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

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period February 4, 2016, until February 3, 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.

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. CHRONOLOGY

The Director denied the petition in November 2017. The Petitioner filed a timely appeal in December 2017, but the appeal did not identify specifically any erroneous conclusion of law or statement of fact for the appeal as required by 8 C.F.R. § 103.3(a)(1)(v), and on page 4 of the instructions to Form I-290B.

Instead of submitting any statement or evidence with the appeal, the Petitioner checked a box on the appeal form indicating that a "brief and/or additional evidence will be submitted to the AAO [Administrative Appeals Office] within 30 calendar days of filing the appeal." Page 6 of the Form I-290B instructions advised the Petitioner that "[a]ny brief and/or additional evidence submitted after the initial filing of Form I-290B must be submitted directly to the AAO," and told the Petitioner where to find that address. This direct submission requirement derives from the regulation at 8 C.F.R. § 103.3(a)(2)(viii). The submission deadline passed on January 30, 2018. At that time, the record contained no further submission from the Petitioner.

We summarily dismissed the appeal on June 15, 2018, stating: "we have not received anything further from the Petitioner." On motion, the Petitioner disputes this finding, and submits a supplementary statement, along with postal documentation showing timely delivery on January 23, 2018.

As we will explain below, the Petitioner has established that it submitted a supplement to the appeal, but not that we erred by summarily dismissing the appeal.

III. MOTION TO RECONSIDER

A motion to reconsider must establish that our 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).

In this instance, the Petitioner has not identified any incorrect application of law or policy. Furthermore, the supplement to the appeal was not in the record of proceedings at the time of the summary dismissal decision in June 2018, and our observation to that effect was not incorrect.

As noted above, the regulations and Form I-290B instructions require submission of appellate briefs directly to the AAO. Every document submitted to the Department of Homeland Security (which includes the AAO) must be submitted in accordance with the form instructions. 8 C.F.R. § 103.2(a)(1).

In this instance, the Petitioner did not file the supplement in accordance with the form instructions. Instead of submitting the supplement directly to the AAO, as instructed and required, the Petitioner repeatedly sent the materials elsewhere:

- In January 2018, the Petitioner sent the materials to a U.S. Citizenship and Immigration Services processing facility in Phoenix, Arizona, which accepts filings but not supplements to appeals. The Phoenix processing facility returned the misfiled supplement to the Petitioner.
- The Petitioner resubmitted the materials to the Phoenix address in March and again in April 2018. Both times, the facility again returned the misfiled materials to the Petitioner.
- In May 2018, the Petitioner submitted the materials to the Vermont Service Center.

When the Petitioner filed its motion in July 2018, however, the Petitioner did not disclose the above history. By sending the supplementary materials to the wrong address, the Petitioner significantly delayed their incorporation into the record. The original materials did not reach the AAO until October 2018. Therefore, the summary dismissal was not in error at the time of the decision in June 2018.

The latest filing does not meet the requirements of a motion to reconsider, and therefore must be denied. *See* 8 C.F.R. § 103.5(a)(4).

IV. MOTION TO REOPEN

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). For the reasons explained below, we find that the evidence submitted on motion does not warrant reopening of the proceeding or approval of the petition.

A review of the record confirms that our summary dismissal of the appeal was warranted. The regulations state: "An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal." 8 C.F.R. § 103.3(a)(1)(v).

The Petitioner's appeal consisted of a Form I-290B in which the Petitioner indicated that it would submit a brief and/or additional evidence. Part 3 of the Form I-290B requires the filing party to provide a statement that specifically identifies an erroneous conclusion or law or fact in the decision being appealed. The Petitioner did not submit this required statement with its Form I-290B and did not supplement the appeal with a brief or evidence after filing the form. We properly determined that the regulations required the summary dismissal of the appeal.

The Petitioner has not provided new evidence on motion to establish that it had timely submitted the required statement, a brief, or additional evidence directly to the AAO to establish a basis for its appeal. The Petitioner has not shown proper cause to reopen the proceeding.

Even if we were to grant this motion and consider the newly submitted supplementary materials, we note that the petition still would not be approvable. Below, we will briefly address the substantive assertions in the Petitioner's appellate statement.

V. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity. The Petitioner's description of the Beneficiary's position relies on the statutory definition of an executive capacity, and therefore we restrict our analysis accordingly.

"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.

Based on the statutory definition of executive capacity, the Petitioner must first show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must 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); *Champion World*, 940 F.2d 1533.

When examining the claimed executive capacity of a given beneficiary, we will look to the petitioner's description of the job duties. The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, we examine the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

A. Duties

The Petitioner described the Beneficiary's claimed executive role in terms that emphasized his high-level authority over the company, stating, for instance, that the Beneficiary "oversees operations," "implements plans," and "identifies problems and opportunities." The job description filled more than two pages, but contained few details about the actual tasks the Beneficiary performs. The Petitioner stated that examples of the Beneficiary's executive decision-making included taking early steps to open new branches and contracting with outside providers for legal, financial, and technical services. The evidence submitted in this regard does not establish that the Beneficiary's tasks are primarily in an executive capacity.

The Director denied the petition, based in part on a finding that the Beneficiary's job description "is broad and general," and "evidence indicates that the beneficiary is performing non-qualifying routine day-to-day duties."

In its initially misfiled appellate submission, the Petitioner submitted further documents, "intended to show and prove that [the Beneficiary conducted] all senior level activities":

- An August 2017 bill from a state regulatory authority, submitted because it referred to the Beneficiary as "President/CEO";
- Compliance Committee Meeting reports, indicating that the Beneficiary and the compliance officer "reviewed company compliance folders, records, and ID documentations"; and
- Minutes of a November 2017 shareholders' meeting, showing the Beneficiary's attendance.

The submitted documents show that the Beneficiary holds a position of authority with the petitioning U.S. entity, but not that his duties are primarily those of an executive. Timely consideration of these documents would not have resulted in approval of the petition on appeal.

The Petitioner also submitted a copy of its 2014 commercial lease, which the Beneficiary countersigned in his capacity as assistant general manager of the foreign parent entity's human resources department. This document predates, and is not relevant to, his claimed executive capacity in the United States.

B. Staffing

The Petitioner previously filed a new office petition in December 2014. That petition was approved in February 2016, and as a result the Beneficiary was granted L-1A status through February 3, 2017. In the present proceeding, the Petitioner seeks to extend the validity of the new office petition. Among other requirements, a petitioner seeking to extend an L-1A petition that involved a new office must describe the staffing of the new operation and submit evidence of the numbers and types of positions held. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D).

The Petitioner listed eight individuals who provide services to the company, not all of whom are employees. Some, such as an attorney and auditor, are contractors who provide services periodically rather than continuously. The Petitioner provided minimal job descriptions for positions such as compliance officer, teller, and caretaker. Likewise, the Petitioner did not provide enough information about the company's daily business activities to establish that the company requires a sufficiently complex organizational structure to warrant executive leadership.

In the appellate brief, the Petitioner provided longer job descriptions for some of the Beneficiary's subordinates and contractors. Some of these individuals fulfill responsibilities mandated under industry regulations, but the Petitioner has not established that the company has a management structure that requires executive oversight. The record does not directly indicate how many of the Beneficiary's subordinates are full-time employees, which bears on the question of the company's need for a complex management structure.

VI. CONCLUSION

For the reasons discussed, the Petitioner has not shown proper cause for reopening or reconsideration and has not overcome the grounds for dismissal of its appeal. The motion to reopen and motion to reconsider will be denied for the above stated reasons. In visa petition proceedings, it is the 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 reconsider is denied.

FURTHER ORDER: The motion to reopen is denied.

Cite as *Matter of J-E-C-, Inc.*, ID# 4421254 (AAO July 12, 2019)