U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-A-B, INC.

DATE: JULY 18, 2019

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a distributor of industrial hardware components, seeks to temporarily employ the Beneficiary as its vice president of operations 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 Vermont Service Center revoked approval of the instant petition concluding that the Petitioner did not establish, as required, that the Beneficiary was employed abroad and would be employed in the United States in an executive capacity. The Petitioner then filed an appeal, which we dismissed, affirming both grounds cited in the denial.

The matter is now before us on a motion to reconsider in support of which the Petitioner submits a legal brief contending that "the Service errored [*sic*]" by not considering the previously submitted job description and misapplied the statute by focusing on staffing size to the exclusion of "other factors."

Upon review, we will deny the Petitioner's motion.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary "in a capacity that is managerial, executive, or involves specialized knowledge," for one continuous year within three years preceding the beneficiary's application for admission into the United States. Section 101(a)(15)(L) of the Act. 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 or executive capacity. *Id.* The petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

II. MOTION TO RECONSIDER

A. Motion Requirements

A motion to reconsider must establish that our decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) 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 a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

B. Analysis

The primary issue to be addressed in this decision is whether the Petitioner has made arguments establishing that our decision to dismiss the appeal was based on an incorrect application of law or USCIS policy with respect to the facts of this case. The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing (in this case, November 2017) and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

As a preliminary matter, we note that the review of any motion is narrowly limited to the basis for the prior adverse decision. Here, the subject of the prior decision was our dismissal of the Petitioner's appeal. As such, the purpose of this decision is to consider legal arguments that pertain to our prior decision dismissing the appeal.

In our appeal decision, we addressed the Beneficiary's foreign and U.S. employment. In a comprehensive discussion of the foreign employment issue, we restated the Beneficiary's job duty breakdown, summarized the Petitioner's response to the notice of intent to revoke, and explained why we found that the submitted evidence of the foreign job duties and the foreign entity's organizational structure was insufficient and did not establish that the Beneficiary was employed abroad in an executive capacity. Although we offer a more condensed discussion of the Beneficiary's proposed employment, we concluded that the Beneficiary would not be employed in a managerial or executive capacity based on our consideration of the Petitioner's organizational structure and the Beneficiary's proposed job duty breakdown, which we noted was identical to the Beneficiary's job duty breakdown with the foreign entity.

To the extent that the Petitioner points to errors in the decision issued by the service center, we note that it did not raise these alleged errors on appeal, where the Director's revocation decision was squarely at issue. Thus, we will not address the claim that "the Service" misapplied the law by neglecting to consider the foreign entity's reasonable needs, because there is no evidence that we made this error in our decision. Rather, we conducted a review of the entire record and, based on the totality of the evidence, determined that the Petitioner did not overcome the Director's determination.

We determined that the job duty breakdown the Petitioner offered lacked sufficient meaningful content as to the Beneficiary's actual job duties; we found this lack of detail to be particularly troubling in light of the nearly ten-year period over which the Beneficiary held the same position. We also pointed to several non-executive job duties assigned to the Beneficiary and questioned whether the foreign

entity was adequately staffed to support an executive position based on our observation of the low amounts paid in employee wages and salaries through July 2016. The Petitioner's complaint that "the AAO makes no correlation between the amount of payroll and the ability of employees to alleviate the executive of day-to-day operational tasks" is unclear, as employee salaries help determine who was employed and the full- or part-time status of the employees who supported the Beneficiary in her foreign position. The Petitioner's claim that we did not mention subordinate employees' job duties in our prior analysis does not establish that we committed legal error, as the issue of staffing was clearly considered and valid questions arose as to whom the foreign entity actually employed and how the Beneficiary was relieved from having to primarily perform non-executive job duties during the relevant time period.

Further, despite the Petitioner's contention, we did not discuss the foreign entity's staffing composition to the exclusion of other relevant factors. As indicated earlier, we also discussed the Beneficiary's job duties within the context of the foreign entity's organizational makeup. The Petitioner correctly observes that we must take into account the reasonable needs of the organization and that a company's size alone may not be the only factor in denying a visa petition for classification as an intracompany manager or executive. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for USCIS 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 or a company that does not conduct business in a regular and continuous manner. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Moreover, the employing entity's reasonable needs will not supersede the requirement that the Beneficiary must be "primarily" employed in an executive capacity, rather than spending the majority of the time on non-qualifying duties. *See* section 101(a)(44)(B) of the Act. The record does not support the Petitioner's contention that we failed to consider the foreign employer's reasonable needs.

We acknowledge that the Petitioner disagrees with our decision dismissing the appeal; however, it has not provided evidence establishing that our findings were based on an incorrect application of law or USCIS 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). Therefore, the Petitioner has not shown cause for reconsideration.

III. CONCLUSION

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. Because the Petitioner has not shown proper cause for reconsideration, it has not met that burden.

ORDER: The motion to reconsider is denied.

Cite as *Matter of D-A-B, Inc.*, ID# 4354333 (AAO July 18, 2019)