U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31318793

Date: JUNE 12, 2024

Appeal of California Service Center Decision

Form I-129, Petition for a Nonimmigrant Worker (L-1A Manager or Executive)

The Petitioner intends to operate a consulting firm providing digital marketing and website design services. It seeks to employ the Beneficiary temporarily as "web design manager" at its new office[1] in the United States under the L-1A nonimmigrant classification for intracompany transferees who are coming to be employed in the United States in a managerial or executive capacity. 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: 1) the Beneficiary was employed abroad for one continuous year of full-time employment within the three years preceding the filing of this petition, and 2) the U.S. entity would be able to support the Beneficiary in a managerial capacity within one year of the petition's approval.[2]

First, the Director discussed the Beneficiary's employment abroad, pointing to records showing that the Beneficiary has been in the United States in the status of an F-1 student since March 10, 2021. The Director observed that the foreign entity's organizational chart, the Beneficiary's foreign job description, and education credentials do not list the Beneficiary's dates of employment. The Director also noted that the Petitioner did not provide paystubs or other evidence showing full-time employment during the relevant period and therefore concluded that the Petitioner did not establish that the Beneficiary was employed abroad on a full-time basis and was physically abroad while working for the foreign entity for one year within three years prior to the filing this petition.

Next, the Director addressed the Beneficiary's proposed U.S. employment in a new office, taking into consideration the Petitioner's business plan and the Beneficiary's list of proposed job duties. The Director determined that most of the proposed job duties would be non-managerial and further stated that the projected staffing does not show: 1) who will relieve the Beneficiary from having to primarily perform non-managerial job duties, or 2) that the Beneficiary's subordinates would be supervisors, professionals or other managers. The matter is now before us on appeal pursuant to 8 C.F.R. § 103.3.

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[1] The term "new office" refers to an organization which has been doing business in the United States 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 no more than one year within the date of approval of the petition to support an executive or managerial position.

[2] The Beneficiary was assigned a managerial position title and listed in the Petitioner's business plan as a manager. The Petitioner does not claim that the Beneficiary's U.S. employment would be employed in an executive capacity.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

Further, we adopt and affirm the Director's decision with respect to the two cited grounds. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997) (noting that the practice of adopting and affirming the decision below has been "universally accepted by every other circuit that has squarely confronted the issue"); *Chen v. INS*, 87 F.3d 5, 8 (1st Cir. 1996) (joining eight circuit courts in holding that appellate adjudicators may adopt and affirm the decision below as long as they give "individualized consideration" to the case).

On appeal,[3] the Petitioner submitted a brief but did not adequately address any of the Director's adverse findings. Regarding the issue of the Beneficiary's employment abroad, the Petitioner asserts that "[t]he standard evidence used as proof of employment is a letter of employment [] or pay records." We note, however, that the Petitioner has not provided the Beneficiary's pay records and previously offered an employment letter that did not specify the Beneficiary's dates of employment or state whether the claimed employment was full-time. Instead, the Petitioner now on appeal submits a new employment letter, dated November 29, 2023, containing the Beneficiary's claimed 2020 salary. Although we acknowledge the Petitioner's submission of this information on appeal, the Petitioner neglected to provide this evidence when it was first requested in the RFE. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, we will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the Petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the Director's request for evidence. *Id.* Under the circumstances, we need not and do not consider the sufficiency of the newly offered salary information.

We further note that even if we were to consider the newly submitted information, the letter is silent on the issue of whether the Beneficiary's employment was full-time, which is a critical element of the foreign employment requirement. *See* 8 C.F.R. § 214.2(l)(3)(ii). And although the Director's adverse conclusion was based in part on the lack of pay records as proof of the Beneficiary's foreign employment, the Petitioner does not acknowledge or address this evidentiary deficiency on appeal.

The appeal brief also refers to reports about "the continuous growth of the Digital Marketing Industry regardless of Covid-19" and asks us to review a report discussing market research which the Petitioner claims "serves as evidence of the growth of this industry." The brief does not, however, acknowledge or address any of the evidentiary deficiencies noted in the denial regarding the issue of whether the Petitioner would be able to support the Beneficiary in a managerial capacity within one year of the petition's approval.

[3] On appeal the Petitioner refers to the brief as "this Brief in support of its Motion to Reopen and Reconsider" and likewise includes the same reference in the document's title heading. Although the Petitioner also references the regulatory criteria for filing a motion to reopen and reconsider, the box marked on the Petitioner's Form I-290B, Notice of Appeal or Motion, shows that the Petitioner filed an appeal, not a motion, and will be treated as such accordingly.

Lastly, while not specifically addressed in the Director's discussion of the Beneficiary's foreign employment, the record does not show that the Beneficiary's claimed employment abroad in the position of "Design and Marketing Assistant" was comprised primarily of managerial or executive job duties. The job description provided initially in a support letter states that the Beneficiary was responsible for "develop[ing] campaigns to advertise our [the foreign entity's] products"; the letter states that this responsibility involved primarily operational, i.e., non-managerial and non-executive job duties, such as conducting engineering research and design development, participating in testing and integration tasks, converting specifications into implementation-ready design features, developing models and prototypes, and creating and maintain design files. We note, however, that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See, e.g.*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

While the additional deficiency discussed above is not a ground for our dismissal of this appeal, the Petitioner will be required to address this deficiency in any future filings, whether in further pursuit of the instant petition or in pursuit of any other employment-based petition where the above-listed issue is relevant to eligibility.

Regardless, the Petitioner did not adequately address the two existing grounds cited in the Director's decision and therefore the appeal will be dismissed based on those two grounds.

ORDER: The appeal is dismissed.