U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-A-I-G- LLC

DATE: JUNE 26, 2019

MOTION ON ADMINISTRATIVE APPEALS DECISION

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

The Petitioner, a trucking company, seeks to continue the Beneficiary's temporary employment as chief operating officer (CEO) 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 California Service Center denied the petition, concluding that the Petitioner did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity under the extended petition. We dismissed the appeal and upheld the Director's decision. In the appeal decision, we added a second ground for denial, finding that the Petitioner did not provide evidence to support the claim that it is a subsidiary of the foreign entity where the Beneficiary had been previously employed.

The matter is now before us on a motion to reopen and reconsider. The Petitioner disputes our findings and offers additional evidence to support its claim regarding its qualifying relationship with the foreign entity.

Upon review, we will deny the combined motion to reopen and motion to reconsider.

I. MOTION REQUIREMENTS

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 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). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. MOTION TO REOPEN AND RECONSIDER

The issue in this matter is whether the Petitioner has offered arguments establishing that our decision to dismiss the appeal was based on an incorrect application of law or U.S. Citizenship and Immigration Services (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, January 2018) and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

Because the Petitioner has now offered evidence in support of its claimed qualifying relationship with the Beneficiary's foreign employer, we will withdraw our adverse finding regarding this issue. Notwithstanding our favorable finding on the qualifying relationship issue, we will deny the combined motion to reopen and reconsider. While the Petitioner has provided new evidence and a legal brief citing to case law in support of its motion, it has not demonstrated that we incorrectly applied the law and policy to the facts presented. Accordingly, the Petitioner has not shown proper cause for reopening or reconsideration.

A. Previous AAO Decision

In dismissing the appeal, we first addressed the issue of job duties, finding that the Petitioner provided deficient job descriptions for the Beneficiary and his subordinate and did not offer sufficient supporting evidence to show that the Beneficiary would primarily allocate his time to executive-level tasks within the context of the Petitioner's trucking business. We also found that the job duty breakdown and evidence submitted to support that breakdown generally lacked detail; while we noted that some duties were more specifically defined, we found that they reflected the Beneficiary's direct involvement in operational, non-executive functions. Lastly, despite acknowledging that the Beneficiary holds a senior position within the petitioning organization, we determined that neither placement within the organization nor the Beneficiary's discretionary authority establishes that he would spend his time primarily performing job duties of an executive nature.

We also addressed the company's staffing, finding that the Petitioner did not adequately discuss the duties performed by the Beneficiary's only subordinate. We noted that the subordinate's job duties were broadly stated and appeared to overlap with the Beneficiary's own job duties. We also pointed to the lack of evidence showing that the Beneficiary actually delegates job duties to his subordinate and noted that the Petitioner did not provide any samples of daily productivity reports to support the claim that reviewing these reports is among the Beneficiary's assigned job duties.

Next, we discussed the Petitioner's organizational chart, pointing out that the staffing hierarchy depicted in the chart was not consistent with employee paystubs. Namely, we observed that the operation supervisor, whom the chart depicted as the general manager's subordinate, was not paid wages in the months leading up to this petition's filing date. We also noted that the general manager, who was depicted as the Beneficiary's direct subordinate, was paid the same wages as the dispatcher and the data entry employee; we found that this similarity in wages to be contradictory to the discretionary authority the general manager is claimed to possess over the operation and employees that are depicted below his placement in the hierarchy. Further, although we acknowledged the

Petitioner's use of contractors to provide certain repair and maintenance services, we found that there was no evidence to support the claim that such contractors are part of the Petitioner's organizational hierarchy and are under the Beneficiary's executive control. In addition, we observed that the Petitioner engaged only two truck drivers as of the filing date and questioned whether an entity with the Petitioner's current staffing composition warrants the services of a CEO.

In sum, we assessed these various factors as part of a comprehensive analysis and considered the opinion letters the Petitioner offered on appeal. However, we determined that the record did not include sufficient information about the Beneficiary's job duties and contained questionable evidence regarding the Petitioner's staffing, which led us to question whether the Petitioner's organizational hierarchy at the time of filing was sufficient to elevate the Beneficiary to an executive position and enable him to allocate his time primarily to the performance of executive-level tasks.

B. Motion to Reopen

On motion, the Petitioner has provided new evidence to overcome our prior adverse finding regarding the qualifying relationship issue, thereby causing us to withdraw the adverse finding specifically as it pertains to that issue. However, the Petitioner has not provided new evidence to overcome the remaining finding regarding the Beneficiary's employment in an executive capacity in the United States within one year of this petition's approval. Therefore, the Petitioner has not shown proper cause for reopening.

C. Motion to Reconsider

Next, we will address the motion to reconsider. As previously noted, a motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of USCIS or Department of Homeland Security policy.

The Petitioner states that our decision "focus[ed] heavily on staffing" and cites *Nat'l Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989) and *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, 1574 (N.D. Ga. 1988) to support the assertion that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act primarily in a managerial or executive capacity. We note, however, that the Petitioner has not furnished evidence to establish that the facts of the instant petition are analogous to those in *Nat'l Hand Tool Corp.*, where the Fifth Circuit Court of Appeals decided in favor of the former Immigration and Naturalization Service (INS), or *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff. With respect to *Mars Jewelers*, we are not bound to follow the published decision of a U.S. district court in matters arising within the same district. *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.* at 719.

We further note that in both *Nat'l Hand Tool Corp.* and *Mars Jewelers, Inc.*, the courts emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations when reviewing managerial or executive capacity. This is consistent with our interpretation of the regulations and statute, which we interpret as prohibiting discrimination against small or medium-size

businesses. However, consistent with both the statute and the holding of *Nat'l Hand Tool Corp.*, the Petitioner is required to establish that the Beneficiary's position consists of primarily managerial or executive duties and that it will have sufficient personnel to relieve the Beneficiary from performing operational and/or administrative tasks. Similar to the court in *Nat'l Hand Tool Corp.*, 889 F.2d at 1472, n.5., our holding was based on the conclusion that the Beneficiary is not primarily performing executive job duties. Although the Petitioner's organizational hierarchy and staffing contributed to our analysis of the totality of the evidence, our decision does not solely rest on the Petitioner's size, as indicated by our comprehensive discussion of the Beneficiary's job duties, the job duties of his subordinate, and other relevant factors that led us to question the level of supervisory authority the Beneficiary's alleged supervisory subordinate actually possessed.

In addition, the Petitioner asserts that we must take into account its reasonable needs, contending that it has established the need to hire an executive based on its total assets, income, and work volume. We note, however, that the reasonable needs of a petitioner will not supersede the requirement that a beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir. 2008). As discussed in our prior decision, the Petitioner did not establish that the Beneficiary would primarily perform executive-level tasks, nor did it demonstrate that its organization, as constituted at the time of filing, could actually support the Beneficiary in an executive position by relieving him from having to primarily perform operational tasks.

The Petitioner incorrectly focuses on its need to employ someone who will lead its organization and make its discretionary decisions, meanwhile overlooking the fact that the head of an organization may not necessarily perform primarily executive-level duties. The fact that the Beneficiary will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive or managerial in nature. Sections 101(A)(44)(A) and (B) of the Act. While the Beneficiary may exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, these factors alone are insufficient to establish that the actual duties to be performed would be primarily executive in nature. The Petitioner's repeated references to prior submissions do not establish that we incorrectly applied a law or USCIS policy. Moreover, we considered all previously submitted evidence, along with the remainder of the record, in our *de novo* review on appeal. Therefore, the referenced evidence need not be addressed again.

In sum, the Petitioner has not established that our decision was incorrect based on the evidence of record at the time of our decision. Therefore, it has not shown proper 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 reopening or reconsideration, it has not met that burden.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of E-A-I-G- LLC*, ID# 3771733 (AAO June 26, 2019)