U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-USA LLC

DATE: JUNE 29, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a freight forwarding and courier service provider, seeks to temporarily employ the Beneficiary as its president under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality 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. The Petitioner appealed the denial which we dismissed finding that the Petitioner had not established that the Beneficiary will be employed in an executive capacity for the U.S. entity.[1] We also determined that the record did not establish a qualifying relationship between the Petitioner and the Beneficiary's foreign employer.

The matter is before us on a combined motion to reopen and motion to reconsider. In its combined motion, the Petitioner submits additional evidence and asserts that the record established that the Beneficiary was eligible for a visa and that a qualifying relationship exists between it and the Beneficiary's foreign employer. We will deny the motions.

I. MOTION REQUIREMENTS

To merit reopening or reconsideration, a petitioner must meet the formal filing requirements (such as submission of a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee), and show proper cause for granting the motion. 8 C.F.R. § 103.5(a)(1).

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 is based on legal grounds and must (1) state the reasons for reconsideration; (2) be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or policy; and (3) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

[1] The Petitioner did not claim that the Beneficiary would be employed in a managerial capacity.

II. ANALYSIS

A. Motion to Reopen

1. U.S. Employment in an Executive Capacity

The Petitioner stated that it was a five-employee business when the petition was filed. The Petitioner asserted that it intended to employ the Beneficiary as president in an executive capacity, but noted on its organizational chart that the Beneficiary would also occupy the position of general manager. The Petitioner claimed that the Beneficiary's position as a general manager would be temporary until a general manager could be hired. In our decision we found that the Petitioner's description of the Beneficiary's proposed duties was vague and did not delineate his specific daily tasks or explain how the Beneficiary would allocate his time to perform primarily executive job duties. We also found that the record did not include probative evidence that the Petitioner had adequate staff, either direct employees or contractors, when the petition was filed in June 2016, to relieve the Beneficiary from involvement in the day-to-day operations of the company.

On motion, the Petitioner provides a revised description of the Beneficiary's duties and the allocation of his time to those duties and asserts that it "has decided to accommodate its business strategy to the company's most immediate needs and have the Beneficiary work as its General Manager." The Petitioner states that "[t]he original idea of having the Beneficiary fill the General Manager position has changed from being a temporary arrangement . . . to a more permanent situation in which the Beneficiary will be primarily performing managerial duties for the duration of his L1 visa." However, a petitioner cannot offer a new position to a beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities on motion. A petitioner must establish that the position offered to a beneficiary, when the petition was filed, merits classification as a managerial or executive position. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to U.S. Citizenship and Immigration Services' requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

The Petitioner's revision of duties and claim that the proffered position is now a managerial position does not clarify or provide more specificity to the original duties and expectations for the position, but rather is a material change to the petition. If significant changes are made to the initial request for approval, a petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

The Petitioner also submits a revised organizational chart, IRS Forms W-2, for the 2016 year, as well as the Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2016. The petition was filed in June 2016, thus the most relevant quarter to demonstrate the Petitioner's staffing when the petition was filed, would be the Form 941 for the second quarter of 2016. Thus, the Form 941 submitted on motion is not probative in establishing eligibility when the petition was filed. The

Petitioner acknowledges that the administrative manager, accountant, and bookkeeper positions were vacant when the petition was filed, but asserts that all of these positions were filled shortly after it filed its appeal. The Petitioner also contends that it had a competent team of employees as of the date of filing the Form I-129 petition. However, the W-2 forms issued by the Petitioner in 2016 do not identify each individual's period of employment during that year. Accordingly, the record on motion does not include new facts that are pertinent to the Petitioner's actual staffing levels when the petition was filed. The Petitioner has not submitted new facts sufficient to satisfy the requirements to reopen this matter on this issue.

2. Qualifying Relationship

The Beneficiary and his spouse own 100 percent of the Petitioner, with the Beneficiary owning 60 percent and his spouse owning 40 percent. The record shows that the Beneficiary owns 47 percent of the foreign entity, while his spouse owns 50 percent, and three other individuals each own one percent of the foreign entity. In our decision, we noted an inconsistency in the ownership of the Petitioner as designated on the Petitioner's 2014 Form 1065, U.S. Return of Partnership Income. We also found that even absent the inconsistency, the record did not demonstrate that a qualifying relationship existed between the Petitioner and the Beneficiary's foreign employer.

On motion, the Petitioner offers its accountant's explanation of the inconsistency on its 2014 tax return. The Petitioner also asserts that we did not properly consider the fact that the foreign entity's minutes of a March 2015 shareholders meeting show that "all of the shareholders have delegated the control of the company to the Beneficiary."

The Petitioner has clarified the inconsistency in the record regarding its ownership and the record otherwise supports the Beneficiary and his spouse's percentage ownership in the Petitioner. The March 2015 minutes of the foreign entity's shareholder's meeting, however, do not establish that the foreign entity's shareholders have delegated the authority to control the foreign entity to the Beneficiary. Rather, the minutes are ambiguous and appear to authorize the Beneficiary to represent the foreign entity but does not clearly state that the shareholders authorize the Beneficiary to vote their shares in the foreign entity. The foreign entity's minutes of the March 22, 2015, meeting is not an agreement which authorizes the Beneficiary to vote the foreign entity's shares by proxy.

The Petitioner also submits the U.S. Embassy's printout providing a general overview of the Dominican Republic's marriage laws, including matrimonial property rights. In immigration proceedings, the law of a foreign country is a question of fact which must be proven if a petitioner relies on it to establish eligibility for an immigration benefit. *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973). Here, the Petitioner has not submitted excerpts of the pertinent foreign law or a factual interpretation of that law as it pertains specifically to the Beneficiary and his spouse.[2] The Petitioner

[2] For example, when reviewing the U.S. Embassy's printout regarding the Dominican Republic's marriage laws, it appears that the husband's power over community property adheres to the administration and management of the estate; however, it is not clear how "estate" is defined. Moreover, the record does not include affidavits or other evidence of the

has not sufficiently established as a matter of fact that legally the Beneficiary's spouse's majority interest in the foreign entity is subject to the Beneficiary's control.

Accordingly, the Petitioner's motion to reopen does not contain any new facts that are relevant in a reopened proceeding. The motion to reopen is not supported by affidavits or documentary evidence demonstrating eligibility at the time the underlying petition was filed. The Petitioner has not shown proper cause to reopen the proceeding and the motion to reopen will be denied.

B. Motion to Reconsider

1. Employment in an Executive Capacity

The Petitioner does not offer any legal argument that our decision on the issue of the Beneficiary's employment in an executive capacity was incorrect. Rather, the Petitioner changes the Beneficiary's position which is a material change requiring the filing of a new petition and disagrees with our decision without offering pertinent precedent decisions to support its alternate conclusion. The record on motion to reconsider is insufficient to warrant reconsideration of our decision on this issue.

2. Qualifying Relationship

In its motion to reconsider, the Petitioner also asserts that *Ore v. Clinton*, 675 F. Supp. 2d 217, 226 (D.C. Mass. 2009), cited in our decision, is not applicable to the matter at hand. The Petitioner notes that the cited case refers to companies owned by members of the same family and claims that it does not dispute that familial relationships, other than spouses and parent-minor children, require a proxy or other legal agreement to show common ownership of any asset. The Petitioner states that its claim differs from the general familial relationships in the cited case, in that the same spouses own both it and the foreign entity; and that Dominican law, absent other types of arrangements entered into between the parties, places all assets and liabilities acquired by either spouse in the marital estate. The Petitioner concludes that the Beneficiary and his spouse legally are the joint owners of both entities.

The Petitioner here does not offer other pertinent precedent decisions to establish that our interpretation of *Ore* is incorrect. The record on the motion to reconsider is not supported by pertinent precedent decisions which establish that our decision was based on an incorrect application of law or policy. Similarly, the record does not establish that our decision was incorrect based on the evidence of record at the time of our decision. Therefore, the Petitioner has not shown proper cause for reconsideration on this issue.

Beneficiary and his spouse's marital arrangement or affidavits acknowledging that the couple's property is governed by the Dominican Republic's community property laws.

III. CONCLUSION

For the reasons discussed, the Petitioner has not shown proper cause for reopening or reconsideration or established eligibility for the immigrant benefit sought.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of D-USA LLC*, ID# 472246 (AAO June 29, 2017)