U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-G- INC.

DATE: JUNE 29, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a one-employee restaurant business, seeks to extend the temporary employment of the Beneficiary as its president 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. The Petitioner appealed the denial which we dismissed finding that the Petitioner had not established, as required, that: (1) it was doing business in the United States for the previous year; and (2) the Beneficiary will be employed in an executive capacity for the U.S. entity.

The matter is before us on a combined motion to reopen and motion to reconsider. In its combined motion, the Petitioner asserts that the regulations governing the extension petition for a "new office" are ambiguous, thus allowing U.S. Citizenship and Immigration Services to exercise favorable discretion when considering the "doing business" requirement. The Petitioner also claims that it will shortly have evidence that it is doing business and suggests that we issue a request for evidence (RFE) on this issue. The Petitioner asserts that its reasons for not doing business also demonstrate why it did not establish that the Beneficiary would be employed in an executive capacity. The Petitioner does not further address this issue. 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).

II. ANALYSIS

A. Motion to Reopen

The Petitioner stated that it is a restaurant business established in 2015, but acknowledged that its restaurant business was not open and doing business at the time of filing this extension petition. The Petitioner explained, in response to the Director's RFE and on appeal, that due to construction obstacles it was unable to hire staff and was forced to delay operations. In our dismissal of the appeal, we found that a visa petition that involved the opening of a new office may be extended only if the Petitioner meets all of the enumerated regulatory criteria, including establishing that it was doing business for the previous year. *See* 8 C.F.R. § 214.2(l)(14)(ii)(B).

In its motion to reopen, the Petitioner submits a statement listing several of the construction obstacles it had encountered and indicates that at various intervals it had addressed the construction issues. For example, the Petitioner states that the roof detail plan for the restaurant was finally ready and was approved on November 22, 2016, almost five months after it had filed this extension petition. The Petitioner requests that we issue an RFE so that it may have the opportunity to further develop the record on the issue of doing business.

We have considered the Petitioner's statement of facts regarding its efforts to commence doing business; however, these facts are not relevant to the issue at hand. As we determined previously, the extension of a new office petition requires that the Petitioner establish that it has been engaged in the regular, systematic, and continuous provision of goods or services in the United States for the entire year prior to filing the petition. Issuing an RFE regarding the company's current operational status would not cure the Petitioner's acknowledged inability to satisfy the new office extension regulations at the time of filing. The Petitioner should also note that there is no provision permitting additional time to submit a brief or additional evidence on a motion to reopen or reconsider. The additional evidence must comprise the motion. *See* 8 C.F.R §§ 103.5(a)(2)-(3).

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

In its motion to reconsider, the Petitioner asserts that the regulation at 8 C.F.R. § 214.2(l)(14)(ii) governing an extension petition for a new office and the regulation at 8 C.F.R. § 214.2(l)(3)(v)(c) governing the opening of a new office, create a regulatory ambiguity that would allow us to exercise

favorable discretion and approve this extension petition. We disagree. The regulations are distinct and clear.

The new office regulation, which allows a petitioner one year to do sufficient business to support a manager or executive, is distinct from the new office extension regulation, which requires that a petitioner establish that it has been doing business for the previous year. That is, a petitioner may establish that it has been doing business for the previous year, but may not be sufficiently complex to establish that it can support a manager or executive position, as those terms are defined in the statute. *See* section 101(a)(44) (A) or (B) of the Act. In this matter, the Petitioner has not established the first hurdle of eligibility for the extension of a new office petition because it has not established that it was doing business during the validity period of the previously approved new office petition, as required. The Petitioner was also unable to establish the separate and distinct requirement of being sufficiently complex to support the Beneficiary in an executive capacity, even though the new office regulation allowed the Petitioner a year to accomplish this level of complexity. As we determined, the Petitioner did not have an organizational hierarchy with a tier of managerial employees, or any other support staff, through whom the Beneficiary could be expected to direct the management of the organization when the new office extension petition was filed. Thus, the record also did not establish that the Petitioner had grown sufficiently in the past year to support an executive position, as it had no staff to relieve him from performing all of the administrative and operational tasks of the organization.

The Petitioner has not established that our prior decision was incorrect at the time of that decision. Therefore, the motion to reconsider will be denied.

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 S-G- Inc.*, ID# 457723 (AAO June 29, 2017)