U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-S-USA, INC.

DATE: MAR. 13, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, an operator of automated payment solutions, seeks to temporarily employ the Beneficiary as president and CEO of its new office[1] 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 denied the petition, concluding that the Petitioner did not establish, as required, that it would employ the Beneficiary in a managerial or executive capacity within one year of approval of the petition.[2] The Petitioner subsequently filed an appeal, which we dismissed.

The matter is now before us on a motion to reconsider. On motion, the Petitioner submits a brief and asserts that "[i]nstead of properly considering and analyzing the submitted evidence, the AAO ignored the legal and factual substance of the argument." The Petitioner maintains that "it is clear that [the Beneficiary] would be acting as a manager or executive in addition to managing an essential function of the business."

Upon review, we will deny the motion to reconsider.

I. MOTION REQUIREMENTS

To merit reopening or reconsideration, a petitioner must meet the formal filing requirements (such as, for instance, 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).

[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 Director initially denied the petition based on a finding that the Petitioner did not establish that it had secured sufficient physical premises to house its new office. After reviewing the Petitioner's appeal, we withdrew the Director's decision and remanded the matter to the service center for further review and issuance of a new decision.

A motion to reconsider must establish that we based our decision on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceeding at the time of the decision. A petitioner must support its motion to reconsider with a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy. 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. ANALYSIS

For the reasons discussed below, we will deny the motion to reconsider. While the current motion includes citations to relevant statute, regulations and case law, the Petitioner has not established how we incorrectly applied USCIS law or policy to the facts presented or shown proper cause for reconsideration. In fact, much of the brief submitted on motion is identical to the brief submitted in support of the Petitioner's appeal of the Director's decision, and we addressed these arguments previously.

A. Previous AAO Decision

In dismissing the Petitioner's appeal, we determined that the Petitioner did not sufficiently or consistently describe the Beneficiary's proposed managerial or executive duties. In doing so, we analyzed three different job descriptions, as well as duties attributed to the Beneficiary in the Petitioners' business plan, and determined that a new job description provided on appeal did not assist in clarifying the ambiguities in the record regarding the nature of the Beneficiary's duties. We acknowledged that the Beneficiary would be the senior employee in the company, but found insufficient evidence that he would perform primarily managerial or executive duties within one year.

We also found that the Petitioner did not support its claim that the Beneficiary would delegate most of the company's operational duties to subordinate managerial or professional employees and contractors within one year. We emphasized that a number of critical operational tasks (such as sales, marketing and logistics) appeared to fall within the Beneficiary's area of responsibility rather than being assigned to the proposed staff. Although the Petitioner indicated that it would hire three subordinate employees during its first year of operations, it did not establish that any of these employees would have their own subordinates, nor did it provide evidence that the subordinates would hold professional positions. Finally, we acknowledged the Petitioner's claim that the Beneficiary would oversee independent contractors responsible for legal and accounting matters, but found that the company's business plan did not corroborate its claim that the Beneficiary would supervise and work with these contractors on a day-to-day basis.

B. Motion to Reconsider

In support of its motion to reconsider, the Petitioner repeats one of several previously-submitted versions of the Beneficiary's job description and cites to the regulatory and statutory requirements

for this nonimmigrant classification in support of its claim that the Beneficiary would act in a managerial or executive capacity within one year. However, the Petitioner does not state specifically how we misapplied the regulatory or statutory provisions to the facts of this case in our appellate decision, nor does it attempt to clarify factual and evidentiary inconsistencies and deficiencies that we addressed at length in our decision and which led us to dismiss the appeal. Rather, the Petitioner generally asserts that we "ignored the legal and factual substance of the argument," did not properly consider and analyze the submitted evidence, and failed "to articulate clear reasons for [the] decision." The Petitioner's general allegation of error in the application of the statutory definitions of managerial and executive capacity is insufficient to show proper cause for reconsideration.

Our prior decision analyzed the Petitioner's evidence at length and explained why that evidence was insufficient to meet the eligibility requirements: While the Petitioner maintains on motion that it submitted a "meticulously detailed description of the Beneficiary's daily duties," and states that we erred in determining that the duties were not specific enough, we actually addressed several different descriptions of the Beneficiary's duties in our decision and explained why the descriptions were internally inconsistent and not supported by the totality of the evidence. We noted, for example, that the Petitioner's business plan attributed a number of non-managerial and non-executive duties to the Beneficiary. However, the Petitioner did not include these non-qualifying duties in any of its enumerated lists of his proposed duties, therefore introducing doubt regarding the nature of the Beneficiary's proposed tasks and the amount of time he would allocate to managerial or executive duties.

The Petitioner's primary legal argument on motion is that we over-emphasized the new office's projected staffing levels in determining that the Petitioner did not meet its burden to show that the Beneficiary would be performing primarily managerial or executive duties within one year. The Petitioner notes that "[r]egardless of the proposed staffing levels, the managerial capacity of a person does not depend on the number of employees the manager supervises, but instead the function that he/she performs for the corporation."

In support of its claim, the Petitioner refers to several non-precedent decisions concerning beneficiaries who we found to be employed as managers and executives. These decisions were not published as precedents and therefore do not bind USCIS officers in future adjudications. *See* 8 C.F.R. § 103.3(c). Non-precedent decisions apply existing law and policy to the specific facts of the individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy.

The Petitioner also cites *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, 1574 (N.D. Ga. 1988), in support of its claim 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. In *Mars Jewelers*, the court emphasized that the former Immigration and Naturalization Service (INS) should not place undue emphasis on the size of a petitioner's business operations when reviewing managerial or executive capacity. This finding is consistent with the statute at 101(a)(44)(C) of the Act, which we interpret to prohibit discrimination against small or medium-size businesses. However, consistent with both the statute and the holding of *Mars Jewelers*, the Petitioner is required to establish that the

Beneficiary's position will consist of primarily managerial or executive duties and that it will have sufficient personnel to relieve the Beneficiary from performing operational and/or administrative tasks.

Our adverse finding in this case is based on the conclusion that the Beneficiary would not be primarily performing managerial or executive duties within one year and was based on the totality of the evidence submitted, including his proposed job duties, the nature of the business, the Petitioner's business plan, the nature of the duties assigned to proposed subordinates, and the absence of proposed staff to perform operational duties that the Petitioner claims are under the Beneficiary's responsibility. Contrary to the Petitioner's claim on motion, our decision did not rest on the company's projected size or staffing levels. We did not object to the Petitioner's projected staffing levels. Rather, we noted that the job duties assigned to the proposed subordinates did not include certain tasks necessary to the day-to-day operation of the company, that the Petitioner did not consistently describe its intended structure, and that the Petitioner's business plan did not corroborate the Petitioner's claim that it would make extensive and daily use of independent contractors to perform the company's legal and accounting functions.

The Petitioner has not overcome our finding that it did not provide sufficient evidence to show that it would support a managerial or executive position within one year of an approval of the new office petition.

III. CONCLUSION

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

ORDER: The motion to reconsider is denied.

Cite as *Matter of E-S-USA, Inc.*, ID# 1129210 (AAO Mar. 13, 2018)